Public Utilities

FORTNIGHTLY

April 4, 1929

PUBLIC UTILITIES REPORTS, INC.
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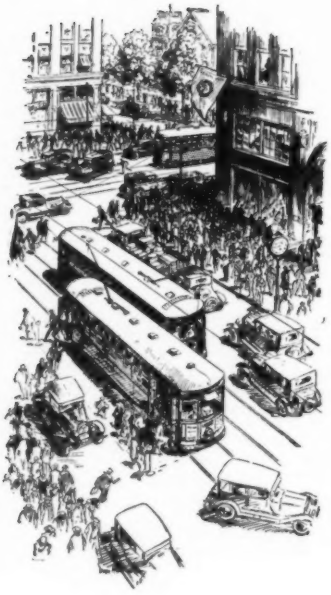

Crowds

. . . *and the* Street Car's *answer*

OUT of the multiplying perplexities of the traffic problem, one fact emerges clearly; the electric street car is our most efficient means of moving masses of people.

The street car passenger occupies six square feet of traffic space. The automobile passenger requires an average of 44 square feet. In thirty of our largest cities, street cars are now carrying over 30,000,000 passengers daily. Attempt to put them in automobiles, and the street—which cannot easily expand its curbs—would be too narrow to hold them.

The street car is handling the crowds. Hundreds of capable and far-seeing street railway executives are busy modernizing equipment and improving schedules so that to-morrow and the day after, winter and summer, this essential public servant may do its work even better and win a still larger measure of popular coöperation.

The next time you board a street car, notice how smoothly it starts and stops, how quickly it gathers speed. Much of this improved equipment carries the General Electric monogram—the same monogram as on the efficient and dependable electric appliances that save time and labor in the electrified home.

GENERAL ELECTRIC

330-88C

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Public Utilities Fortnightly

VOLUME III — *April 4, 1929* — NUMBER 7

PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

PUBLIC UTILITIES FORTNIGHTLY; a magazine dealing with the problems of utility regulation and allied topics, including the official decisions of the State Commissions and courts; endorsed by the National Associations of the Utility Industry and by the National Association of Railroad and Utilities Commissioners, and supported in part by those conducting public utility service, manufacturers, bankers, accountants and other users of the publication. Published every other Thursday; 75 cents a copy; $15.00 a year; with bound volumes and Annual Digest, $32.50 a year. Editorial and advertising office, Munsey Building, Washington, D. C., circulation office, Duffy-Powers Building, Rochester, N. Y. Entered as second-class matter April 29, 1915, at the Post Office at Rochester, N. Y., under the Act of March 3, 1879.

Pages with the Editor

ISSUES of PUBLIC UTILITIES FORTNIGHTLY for February 7th, February 21st, and March 7th are now entirely out of print. Every copy of these dates has been sold, and no further orders can be filled.

* *

FROM the Editor's point of view this demand for the magazine is as gratifying as it is disappointing to our new subscribers. "Out of print" means to the Editor what "Standing room only" means to the theatre manager.

* *

THE moral is plain; insure the regular receipt of your copy by entering your subscription *now*.

* *

WHEN Mr. Average Citizen is compelled to wait on a street corner for a car or a bus that doesn't come along as promptly as Mr. Average Citizen thinks it should, he is likely to become impatient and want to "do something about it."

* *

SOMETIMES he writes a letter of complaint to the Public Service Commission.

* *

So far as the Average Citizen knows, the Public Service Commission is maintained for the specific, if not the exclusive purpose of attending to such complaints from Average Citizens.

* *

THAT is only one of the many misconceptions of the functions of a Public Service Commission; there are innumerable fallacies abroad about these regulatory bodies—so many, indeed, that the Editor believes that the views of a Public Service Commissioner, on this subject, from his inside vantage point, are of real interest.

* *

So he invited one of the most prominent of these Commissioners to contribute an article on the subject; it comes from the facile pen of Hon. Frank P. Morgan, Associate Commissioner of the Alabama Public Service Commission.

* *

"WHEN the invitation came to me" Mr. Morgan admitted, "to write an article on this subject I hesitated about accepting. The hesitation was not caused by any paucity of material; on the contrary I was embarrassed by a wealth of material and a realization of the impossibility of treating in detail even a few of the most common fallacies about State Public Service Commissions and their functions in one magazine article.

* *

"THEN, too, there exists, particularly in my own State of Alabama, an element which ignores the laws laid down by the legislature and the courts, the laws by which the Commissions must be guided in issuing orders; any statement, no matter how sound and how fair, which runs counter to the views of this element is met with a volley of abuse and misrepresentation from it.

* *

"TELLING the people the truth, however, is a duty a public official owes to the public, no matter whether the public likes it or not. How are the people to know the truth if their public servants withhold it from them through timidity? I accept the invitation."

* *

COMMISSIONER Morgan's contribution will appear in the coming issue of PUBLIC UTILITIES FORTNIGHTLY—out April 18th—under the title "Common Fallacies About Public Service Commissions."

* *

IN this issue of PUBLIC UTILITIES FORTNIGHTLY the reader will find several new and interesting decisions of State Commissions. For instance:

* *

A NOVEL plan of dividing street cars into groups and painting each group with a particular emblem, as part of a selective stop system, has met with the disapproval of the Indiana Commission; (see page 161, of "Public Utilities Reports," in the back of this volume). The Commission believes that the resulting confusion of such a complicated scheme would not improve service.

* *

PATENT car wheels may reduce noise on street car lines, but the Illinois Commission has refused to order their installation. The Commission considers this a matter over which the company itself has control. (See page 164.)

* *

THE difficulties of an attorney who objects to the discontinuance of his telephone service for nonpayment received the attention of the Maryland Court of Appeals, in Surratt *v.* Chesapeake & Potomac Telephone Company, (see page 166). Claims that the bills rendered were inaccurate and grossly excessive and an offer to pay the amount properly due are the basis for the controversy.

* *

IN these days of electrification on the farm the terms on which rural consumers can obtain service are of importance. The policy of the Torrington Electric Light Company in this matter has been scrutinized by the Connecticut Commission; (see page 171).

(Continued on page VIII)

CAN a natural gas company which has entered into a contract that reduces the cost of obtaining its product below the cost of producing it with its own plant capitalize the difference or any part of it? This is one of the many questions discussed and passed upon by the Montana Commission. New rate schedules proposed by the Great Northern Utilities Company are disapproved. (See page 176.)

* *

ANOTHER decision by a State Commission on the question of the proper procedure in obtaining the right to develop water power is found in *Re* New-Kanawha Power Company, decided by the West Virginia Commission, (see page 215). Other questions relating to the development of water power are treated in the case of Tennessee Eastern Electric Company *v.* Hannah, before the Supreme Court of Tennessee, (see page 218).

* *

ANOTHER new feature of the magazine in this issue—a review of the new books and magazine articles that treat of the management and regulation of our public utilities.

* *

THE growing interest in the many practical problems—financial, economic, and political as well as legal—that confront public utility executives under the present system of regulation, is commanding the consideration of the country's foremost authorities.

* *

THE most important of their writings will be brought to the attention of the readers of PUBLIC UTILITIES FORTNIGHTLY in the form of occasional commentaries and abstracts.

* *

PERHAPS it was merely coincidence that brought five letters, in a single day, from five professors of economics in five different universities and colleges in five different states—and all in commentary on PUBLIC UTILITIES FORTNIGHTLY. These five commentaries speak for themselves; here they are:

* *

"There can be no question but that PUBLIC UTILITIES FORTNIGHTLY is a most valuable addition to the sources of information available to students of public utility economics."

—PROF. JAMES C. BONBRIGHT,
Columbia University, New York.

* *

"THE new magazine, PUBLIC UTILITIES FORTNIGHTLY, fills a real need in the combination in one volume of the outstanding current decisions of commissions and courts, and of timely articles on vital problems in the field."

—PROF. C. O. RUGGLES,
Harvard University, Boston.

* *

"PUBLIC UTILITIES FORTNIGHTLY is a live and interesting periodical in its special field, and I am sure it is rendering a worth while service to all concerned."

—PROF. I. L. SHARFMAN,
University of Michigan, Ann Arbor.

* *

"PUBLIC UTILITIES FORTNIGHTLY, combining informative articles and comment with the virtually indispensable case reports, is of real value to students of the problems with which it deals."

—PROF. NELSON LEE SMITH,
Dartmouth College, Hanover, N. H.

* *

"I find PUBLIC UTILITIES FORTNIGHTLY very interesting and worth while."

—PROF. DAVID P. LOCKLIN,
University of Illinois, Urbana.

* *

THE old adage that "a difference of opinion is what makes a horse-race" may be as aptly applied to other lines of activity. To the building up of a magazine, for example.

* *

As soon as a contributor to PUBLIC UTILITIES FORTNIGHTLY expresses an opinon on a controversial subject, other contributors promptly rise to view with alarm or to point with pride.

* *

THE interesting article on pages 383 to 392 of this issue, for instance, was inspired by a difference of opinion between its author, Hon. Harold E. West, and the author of an article that appeared in our February 21st number, Mr. Simon J. Block.

* *

BOTH of these esteemed contributors have ideas on the effect of commission regulation on street railway credits; the fact that their ideas do not agree is the very factor that gives their controversy a zest and their contributions a live value.

* *

IN the coming issues of this magazine other articles will appear that will similarly treat both sides of controversial questions within the field of regulation. The Editor will welcome letters from readers who can add to the facts presented in these contributions, correct misstatements—and who agree or disagree with the opinions and conclusions of the authors.

* *

ANYONE who expresses himself in print on a controversial theme may expect a comeback; an attack invites a counter-attack.

* *

AFTER a lifetime of more or less hectic participation in journalism in Atchison, Kansas, the wise old philosopher, Ed Howe, concluded that "about the only thing a paper can attack safely is a man-eating shark."

* *

THERE is more than a modicum of truth in that.

—THE EDITOR.

APRIL

Utilities Almanac

Reminders of Coming Events		*Notable Events and Anniversaries*
4	T^h	The commercial transmission of pictures by wire was inaugurated, 1925. The first pony express left Sacramento, California, for St. Joseph, Mo., 1861.
5	F	The world's first bus service was started when CAPT. BILLY, with four hackney coaches, liveried drivers and uniform rates, opened for business in London, 1634.
6	S^a	Traffic on the "American Rhine" began with HUDSON'S voyage of the "Half Moon," starting from the Texal and ending in the discovery of the Hudson, 1609.
7	S	The first telegraph patent taken out by BELL, 1876. The first public test of trans-oceanic radio telephony between New York and London was made, 1926.
8	M	The Interstate Commerce Commission's report showed that of 200 railroads reporting, only 93 earned expenses and taxes; 1921.
9	T^u	The merger of northern railroads in the Northern Securities Co. was declared illegal, thus giving impetus to ROOSEVELT'S "trust busting" campaign, 1903.
10	W	The first complete sentence of speech was transmitted over wire by ALEXANDER G. BELL to THOMAS A. WATSON, Boston, 1876.
11	T^h	The first locomotive to cross the great bridge over the Mississippi river at Rock Island, Ill., was acclaimed by large crowds as a national event, 1856.
12	F	JOSEPH HENRY, a school teacher of Albany, N. Y., inventor of the electro-magnet, gave a demonstration of telegraphic communication over a mile of wire; 1832.
13	S^a	A world's record for the transmission of news from the Atlantic to Pacific (nine days) was made with the combined aid of the new telegraph and pony express, 1860.
14	S	The world's largest ocean carrier was sunk when the *Titanic* hit an ice-berg on its maiden voyage to New York, 1912.
15	M	First telephone exchange in Louisiana opened at New Orleans, 1879. Work was completed on the Illinois-Michigan canal at a cost of $9,000,000; 1848.
16	T^u	The first freight and passenger service out of Chicago on the Rock Island & La Salle railroad reached its first terminal in Peru, Ill., 1853.
17	W	The original old "John Bull" locomotive left N. Y., under its own steam, on an exhibition trip to the World's Fair in Chicago, arriving amid an ovation April 22, 1893.
18	T^h	PAUL REVERE gave his historic demonstration of a crying need for telephone, telegraph and radio service in Massachusetts, 1775.

"There are no beginnings in America. New developments grow so rapidly that as soon as they appear we are in the middle of them."

Drawing by Abell Sturges

WILLIAM LEROI DULANEY CLAYPOOL

Drug clerk, missionary, filibuster, cowboy, lawyer, State Senator, public utility operator—and now Chairman of the Corporation Commission of Arizona.

—See Page 404

Public Utilities
FORTNIGHTLY

VOL. III: No. 7 APRIL 4, 1929

The PUBLIC UTILITIES AND THE PUBLIC

A CLAUSE in the 14th Amendment of the Federal Constitution provides that a state shall not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This amendment was framed in the reconstruction days following the Civil War when the protection of the newly-liberated negro was the thought uppermost in the minds of the legislators.

Since, then, however, there has been a wide departure from the original spirit of the 14th Amendment. It has been used to cover nearly every type of deficiency in state legislation. It has by far been the ground of more appeals from the state to the Federal Courts than the rest of the Constitution in its entirety. Nearly all of the important rate-case appeals by utilities for Federal protection have been based upon the "property rights clause."

A most interesting and important development of this amendment has just been made by the Supreme Court of the United States. It is based upon the "equal protection" clause. This simply means that a state must apply all of its laws without respect to persons and without unreasonable discrimination in their application.

Here again is a clear intention to protect the colored freedmen of reconstruction times, but by its latest pronouncement the highest court has used it to protect a utility from unwarranted competition. This departure is so wide that without some explanation of the facts in the case, the connection might be hard to see.

In Oklahoma, cotton gins are declared to be public utilities by a law which provides that no one may operate them without obtaining a certificate from the Corporation Commission of that state. The Commission is directed to grant these permits only upon a showing by the parties

making application for them that public convenience and necessity requires the creation of a new utility.

But there is one exception and that is how the trouble started.

It seems that Oklahoma, like many other states, has had her farm problem. To encourage the co-operative activity of the cotton farmers, "Co-operative ginning companies" were exempted from the requirement of showing a good reason from a standpoint of public necessity for going into business before being allowed to do so.

Therefore, when the Durant Co-operative Ginning Company, of Durant, Oklahoma, asked for a certificate, the Commission gave them one without more ado. This drew fire from Mr. W. A. Frost who was engaged in the cotton ginning business in Durant by virtue of a license duly issued to him by the Commission.

He claimed that his permit was in fact a franchise and, therefore, carried with it a sort of contractual guarantee by the state against competitors who could not show a public need for their existence. He took the position that the distinction made by Oklahoma law between a private utility and a co-operative one was purely arbitrary and constituted "unequal protection" in that his property rights in his permit were impaired by a multiplication of competing plants without a showing of need therefor. The Supreme Court held that Mr. Frost was entitled to his injunction and that the state, having once given him a license under certain conditions, was obliged by the Constitution to exact the fulfillment of the same conditions by proposed competitors before allowing them to operate.

A dissent was registered by Justices Brandeis, Stone, and Holmes. Mr. Brandeis, in his dissenting opinion, made the point that since the state is under no obligation to protect gin operators at all, it might lawfully extend protection subject to its policy of encouraging co-operative farming and marketing.

This decision is of vast significance because many utilities may now find that protection from competition is a constitutional right and not, as some have thought heretofore,—merely a gratuitous favor from the state. This case is probably due for discussion.

Frost *v.* Oklahoma Corporation Commission, No. 60.

Irregular Accounting Methods Deprive a Company of the Privilege of Entering a Consolidation

THE Vermont Commission has ruled that unless it can be clearly shown that marked benefits will result from a transfer of all the assets of an operating Vermont utility corporation to a foreign corporation, the public good will best be promoted by keeping such corporations domestic. This rule was followed because the Commission's jurisdiction over the capitalization of domestic corporations is complete, while there is some doubt as to its jurisdiction over the stock and bonds of a foreign corporation.

An application of an Arizona com-

pany to take over certain local utility property was accordingly denied where loose and irregular accounting methods of the applicant argued strongly against the likelihood of public benefit from the proposed merger.

Re Public Utilities Consolidated Corp. No. 1401.

A Service Charge Is Not Apportionable for Seasonal Consumers

IT is coming to be pretty generally accepted that every utility customer of a gas, electric, or water variety at least, is responsible for certain operating expenses and for certain demands upon the plant, as he exercises complete control of the service. Even if for a considerable period his demand is nothing, if his premises are still connected to the mains of the utility, the fact that the latter must carry his account on the books and be ready at all times to supply his service up to his maximum capacity would necessarily imply that, if costs are equitably apportioned, he will have to carry certain expenses.

Nor do the fixed expenses usually making up the service charge cease with temporary cessations in the use of water and hence the large portion thereof is not proratable for portions of the accounting period.

The Wisconsin Commission has ruled in this matter upon application of a municipal water utility that a service charge must properly be treated as a fixed charge, with no allowance for the temporary vacancy of the premises, or for the fact that the customer may have used water for part of a billing period, only.

Re Wauwatosa Municipal Water Works, U-3771.

When Municipal Service May Be Extended Beyond Corporate Limits

THE village of Castile in Wyoming county, New York, operates its own electric plant. Recently it started to extend its line throughout that part of the town of Castile which is outside of the village. The New York Central Electric Corporation, a company operating in that vicinity, brought an action in the supreme court of New York State to restrain such extension, and in granting the injunction Judge Pierce ruled that the right of a municipal plant to extend service beyond its corporate limits must be with the consent and approval of the Public Service Commission wherever there is another company furnishing service within the proposed territory. The village was unable to show that it had such authority and the injunction was issued by the New York Court.

New York Central Electric Corp. *v.* Castile.

Services Rendered by a Holding Company Must Be Proven

WITH the rapid increase of consolidation in the utility business, especially in the telephone industry, the Commissions are scrutinizing more and more the payment made by subsidiaries to parent holding com-

panies for services rendered. In an application by a Wisconsin telephone company for authority to increase rates there was included in operating expenses an amount of $1,200 which was paid to the holding company for such services. The Wisconsin Commission stated:

> "In several cases the Commission has taken the attitude that it would allow as operating expenses of the subsidiary only such charges for holding company service as could be substantiated by evidence of cost to the holding company for rendering such service. No testimony has been offered to substantiate the claims of the subsidiary in this respect and for the purposes of this case the $1,200 payment will not be allowed as operating expense."

Re St. Croix Valley Teleph. Co. U–3748.

The Use of Lights for Crossing Protection

EVER since a dark night back in 1838 when the newly inaugurated "Washington Express" of the Baltimore & Ohio Railroad crashed into a stage coach on the old Bladensburg Road a few miles from the District Line killing "two men and two horses," crossing protection has been recognized as a problem in transportation. One of the chief obstacles in early crossing protection was the lack of powerful light, not only on the railroad locomotives but also on the highways around the crossing. The best that the engineers of years gone by could do in the way of head lights was a comparatively dingy carbide burner before a reflecting mirror. It is easy to understand then why the early crossing protection took the form of watchmen with lowered gates and swinging oil lamps.

But this arrangement left a great deal to be desired in the matter of crossing security. With the advent of the arc light and the incandescent bulb there was no reason why the details of crossing protection should not have been revolutionized long ago but such has not been the case until very recently. Within the last two years, however, there has been a pronounced tendency toward the adoption of automatic flashlights to supplant the gate watchman.

In a recent petition by the Baltimore & Ohio Railroad for permission to make such a substitution at a grade crossing in Illinois the company pointed out the following advantages of the alternating flashlight warning over the crossing watchman: It renders twenty-four hour service as compared with the limited hours of the watchman; it is automatic and impartial, thereby eliminating the personal element; it is visible from both sides of the crossing and less likely to be obscured by passing objects; it cannot be damaged as gates often are by passing vehicles, nor can it damage such vehicles by descending upon them or trapping them between the limits of the crossing as gates sometimes do, and the warning cannot be mistaken by the traveling public as watchman signals often are.

The Illinois Commission in approving of the petition agreed that the automatic protection in many instances is superior to the gate watchman. The opinion states:

"Automatic crossing protection is no longer in the experimental stage. The petitioning railroad company, as well as most all other railroad companies operating in the state of Illinois, have had more or less extensive experience with it and in general, the results of this experience have been favorable. There are conditions however which may tend to lessen its efficiency, such as switching conditions, location of signals, length of track circuits, etc., and these must be given consideration if most effective results are to be secured."

Of course, there will probably always be grade crossings with such heavy traffic that human guardianship will be necessary, but very many of the old descending gates still in use could be very readily retired in favor of the crossing light signal. This change will come only when the types of warning lights are standardized and so impressed on the minds of the public whether walking or driving that a citizen of Maine either touring in California or strolling in Florida will look for and instinctively recognize the identical type of flashlight warning that he has been used to in his own home state. When this high degree of standardization is reached the use of flashlight warnings at railroad crossings will be universal and effective. This is one place where artistic originality is not wanted.

Re Baltimore & O. R. Co. No. 16400.

Physical Telephone Connection Owned by Mutual Company

It is usually the policy of the Commissions and the intent of the law that free service between telephone exchanges should not be discontinued without the consent of the Commission. The Illinois Commission requires that lines for through traffic, although used for free service, shall be maintained the same as lines for toll service. It is also the law in Illinois that the Commission has no power to require mutual telephone organizations to rebuild their lines or re-establish service.

An interesting situation arose at Ransom, Illinois, where the local exchange was operated by the Ransom Telephone Company and a neighboring exchange at Odell was operated by the Odell Telephone Company. Up until a short time ago there had been free service between these two exchanges over a connecting line one mile long, owned and operated by a mutual telephone organization. It appears that this organization became inactive and the connecting line became so deteriorated that the free service was discontinued. There was an investigation by the Illinois Commission on its own motion into the discontinuance of service and the private companies contended that they were not subject to an order directing either one or both of them to rebuild or repair the line because of the fact that neither one owned it. The Commission dismissed the complaint in view of the adequate toll facilities between the two exchanges and because of the fact that only a few subscribers of either company had need for the free service line, and because the mutual company could not be reached.

Illinois Commerce Commission *v.* Ransom Teleph. Co. No. 17721.

Sub-Meters Ruled Out of Capital City

THE right of tenants of a building to purchase electricity directly from a public utility company instead of taking it through submeters after it is purchased by the landlord has been sustained by the Public Utilities Commission of the District of Columbia. The Commission approved a regulation designed to limit the purchase of electric energy to the customer's own use.

In reply to a suggestion that this would result in discrimination because it would permit an owner of a building to buy electricity for the entire building provided he did not remeter such electricity for sale to tenants but would prevent his neighbor from buying electricity for a similar building and selling the electricity required by the tenants on a metered basis, the Commission said:

> "We do not see such discrimination. In either case the owner may buy electricity required by him for furnishing his tenants lighted and electrically equipped rooms, stores or apartments provided it is purchased under the proper schedule according to use. It is no discrimination to say that building owners may purchase current to enable them to rent electrically serviced space, but that if they wish to rent space not so serviced, the public utility cannot sell them such service where it is intended by the owners to resell it to their tenants. The tenants, in such cases, have the right to purchase direct from the utility."

Re Potomac Electric Power Co. Formal Case No. 203, Order No. 748.

The Relative Importance of State Commissions

OUR scheme of government both state and Federal so beautifully designed by the framers of the Constitution as a government of "checks and balances," has been lately referred to by juristic critics as a government of "checkmates and overlappings." This criticism, whether justified or not, is based on the fact that the natural expansion in the powers and duties of the various departments during the last decade has sometimes resulted in a duplication of effort and a conflict of jurisdiction.

To avoid such conflict there is required careful adherence by an administrative department to the rules of precedent. The Public Service Commission of Montana has lately exhibited a noteworthy forebearance of jurisdiction which would conflict with the Highway Commission of that state.

It appears that the Highway Commission in laying out a new route through Meadeville directed the Butte Electric Railway Company to discontinue service over and to remove about 380 feet of rails which caused a change in the location of the terminal. This inconvenienced some of the Meadeville residents who complained to the Public Service Commission and asked that body in the exercise of its regulatory powers over street car service to order a resumption of service, notwithstanding the orders of the Highway Commission. It was suggested that the Public Serv-

ice Commission was a body of superior rank and its orders should take precedent over the orders of the Highway Commission.

The Public Service Commission ruled that the Highway Commission of that state is a co-ordinate legislative agency and as such, equal in rank, importance, independence, and dignity to other legislative agencies. The Public Service Commission is thereupon compelled to accord to the action of the Highway Commission directing the discontinuance of a portion of a utility track for purposes of highway construction, a presumption of legality and validity and until such a presumption is overthrown by a judicial determination of a competent tribunal, the Montana Public Service Commission was of the opinion that it had no authority to enter a conflicting order directing the resumption of service over such track in the exercise of its regulatory powers over utility service.

Sconfienza *v.* Butte Electric R. Co. Docket No. 1023, Report & Order No. 1531.

Advance Advice to Utilities by Governmental Bodies

MR. William G. Shepherd, writing for *Collier's* (February 23, 1929) describes a very interesting reversal in the policy of the Federal Trade Commission within the last few years. Back in 1917, Mr. Shepherd tells us, the attitude of the Commission was pretty much that of a great big policeman waiting to arrest anybody who might happen to venture over the highly doubtful lines laid down for legitimate business by the Federal Anti-Trust Acts and other laws regulating commerce between the states.

If a business man, contemplating a consolidation, asked advice from the Commission he was told that the Commission handed out penalties—not advice. He was told that what he *intended* to do was his own affair but if he went ahead and *did* something which the Commission later decided constituted a violation of law, he would be prosecuted. The late William B. Colver, chairman of the Commission, is said to have once stated:

"We're not a court. It's our sole duty to prosecute those who have violated the law by resorting to unfair practices."

Of course this attitude on the part of the Commission frequently left American business up in the air. One was afraid to move for fear of committing a statutory sin against the purity of American commerce; and one never knew just what constituted such a sin; and further there was no place where one could find out in advance. It was just a matter of taking a chance and seeing how one came out. Mr. Shepherd then tells of the change:

> "Today the Federal Trade Commission confers with business men. Friendly glances instead of cold, fishy eyes meet the gaze of those who go (or are summoned) to confer with the Federal Trade Commission members."

The writer also describes a similar change in the attitude of the Federal Department of Justice and he traces

this right-about-face movement to the advent of the popular Assistant Attorney-General of the Coolidge Administration, Mr. William Donovan.

These facts should set State Commissioners and utility officials thinking. Are the State Public Service Commissioners today advisory bodies? Can a utility executive go to his Commission and get in advance a kind suggestion or friendly warning concerning a proposed policy before he invests thousands of dollars inaugurating it? This is a question each Commission must answer for itself. Some are helpless under existing laws,—hampered from such informal action by statutory restrictions. But it appears that here is an opportunity for real service if it can possibly be arranged.

There is very little evidence from reported cases whether or not any of the State Commissions have shared this co-operative spirit which is now reported to pervade the Department of Justice and the Federal Trade Commission.

The Colorado Commission has recently told a motor carrier that if he wanted to find out whether or not certain business would constitute common carriage, he must take his chances by actual operation before the Commission could decide. The opinion states:

> "In respondent's brief he states that if the Commission should find that he has in any respect violated the law, he would like the advice of the Commission with reference thereto so that he may 'earnestly and honestly try to confine himself to that operation only which can be carried on by a private carrier.' While it is somewhat refreshing at this late day, after respondent has for so long openly and contemptuously violated the law with respect to the subject and an injunction sustained by the supreme court, and has failed to follow the advice of his present attorney, to hear him say that he desires to observe the law, this Commission cannot properly assume the role of an advisor and bind itself as to just what sort of operations the respondent may engage in without violating the law. Each case must necessarily stand on its own facts."

Of course it is easy to understand why the Commission would be unsympathetic with such an operator under the circumstances mentioned, but it would be interesting to find out whether a utility seeking advice in perfectly good faith would receive it, or whether it would be told if it wanted advice to hire a lawyer.

Nevertheless there is evidence that many Commissions, notably in California, Maryland, New York, and Pennsylvania are rendering splendid service both to the utilities and to the ratepayers through informal advice, co-operation, and adjustments. According to Chairman Prendergast of the New York Commission, the Edison Company of New York city made effective last October a new schedule which will cause a reduction of $4,500,000 during the current year in that city alone. John G. Hopwood, Secretary of the Pennsylvania Commission, gives a good account in the last issue of PUBLIC UTILITIES FORTNIGHTLY of what that body has done along these lines in the Keystone State.

Re Honeyman, Case No. 388, Decision No. 2054.

Commissioner Curtiss on Telephone Depreciation

THE computation of utility depreciation is a hackneyed and elusive subject whether looked at economically, legally, or just mathematically. But every now and then someone contributes some clear thought on the matter that deserves notice; and clear thought on depreciation is always welcomed by anyone who ever thought about it. Such a contribution has recently come from Commissioner Curtiss, rendering the opinion of the Nebraska Commission in a telephone rate case. He says:

> "The property was depreciated on the inspection basis, no allowance being made for invisible deterioration, or depreciation due to inadequacy and obsolescence. Applicant claims the right to charge operating expenses and credit its depreciation reserve annually with 6 per cent, computed on the cost of the depreciable property to provide for retirements.
>
> "It is our idea that deterioration in plant takes place internally to some degree as well as superficially, depending on the age and use in service. Inadequacy and obsolescence are also important factors which take place through growth and progress in the art. Applicant cannot demand the right to charge rates for service which are sufficient to pay the cost of plant displaced from all causes contributing to depreciation, and at the same time refuse to recognize all these factors in an appraisal."

Re Lincoln Teleph. & Teleg. Co. Application No. 7026.

Can a Commission Doubt Its Own Powers?

DESCARTE'S philsophical conclusion as to the certainty of his own existence based on his mere ability to think about it, has a legal counterpart in the discussion of some Commissions on the validity of their own delegated powers. Some time ago Congress created the Federal Radio Commission and ordered it to run all unnecessary broadcasters off the air. The Commission has so far been very timid about the matter because of the questionable constitutional validity of such action. Judge S. B. Davis, the eminent radio jurist, in his book on radio law, says:

> "Certainly the Commission should proceed on the theory that the law which creates it is constitutional and that it has the power to do what the law tells it to do. To take the opposite theory is to negative its own right to exist."

The Colorado Commission on the other hand is convinced that it has no right to question its own power to do what it is told by the legislature. The Commission says:

> "We are familiar with some two score cases in which the various State Commissions have held that it is not within the province of a State Utilities Commission to pass upon the constitutionality of an act of the legislature, particularly the one under which it operates."

It seems to be well settled among the State Commissions that they are bound to assume the validity of the statutes under which they exist and which defines their duties and responsibilities until such a time as they might be judicially advised that they are really nonentities.

Denver & Intermountain R. Co. *v.* Swena, Case No. 325, Decision No. 2043.

Binding Effect of Voluntary Concessions

WHEN Joseph Pigford applied to the Pennsylvania Commission in 1927 for authority to transport workingmen by auto from the borough of Elizabeth to the Carnegie Steel Company in the city of Clairton, he was so willing to concede the restrictions sought by other carriers in that vicinity that he voluntarily promised and recorded a stipulation that he would not indulge in local business on the route. The certificate given him did not refer to this restriction and Mr. Pigford began to feel that probably he was not bound by his willing concession. But he was recently ordered to stop violating his promise by the Pennsylvania Commission, which ruled that the mere inadvertent absence of his agreement from his certificate did not release him from observing it in view of the fact that it was made for the purpose of forestalling all protesting parties to the granting of the certificate, who withdrew on the strength of such promise.

Re Pigford, Application Docket No. 17714–1927.

Promotional Water Rates to Encourage Lawn Sprinkling

PROMOTIONAL rates, so much discussed during the last few months, have pretty nearly always been considered as peculiar to gas and electric companies. One would not think offhand that promotional rates would ever apply to a water utility for the simple fact that such rates are chiefly used to stimulate consumption through the use of heavy duty appliances. With regard to water utilities, however, while there are no appliances in common use that are operated by the use of water, nevertheless there are certain uses of water very much analogous to the consumption of current by appliances; one of these is lawn sprinkling.

The Washington Department of Public Works found that unless the customers of Beverly Park Water System had sprinkling rates that would be sufficiently low to permit sprinkling by all resident owners the lawns and gardens would in many instances be abandoned, resulting in a retardation of the growth of the district and a decline in property value of premises already developed. The Department therefore, authorized the placing into effect a special sprinkling rate of 15 cents per one hundred cubic feet during the sprinkling season for all consumption in excess of eight hundred feet, notwithstanding the fact that this would result in a nominal decrease of water delivered. The Department pointed out that the consumption would increase and that there would be consequently no material difference in the gross revenues of the water company.

Department of Public Works *v.* Beverly Park Water Co. No. 6238.

The Right of the Landlord to Resell Current to Tenants

SOME OF THE QUESTIONS THAT ARE INVOLVED:

¶ *Does the submetering system and the retail distribution of current constitute public utility service?*

¶ *Are the landlords and metering companies classified as public utilities?*

¶ *Are the landlords and the submetering companies subject to regulation by the State Commissions?*

¶ *Must an electric utility supply the current?*

¶ *Can the tenant be required to take service from the landlord, or may he deal directly with the electric company?*

BY ELLSWORTH NICHOLS

WHEN we buy our flour or potatoes, we deal with a grocer who does not produce these necessities of life. There are middlemen between us and the producer.

But we have been accustomed to buying electricity directly from the producing company.

Efforts to bring middlemen between electricity users who happen to be tenants of apartment houses or office buildings, and the utilities which produce them have raised a storm of discussion.

There are two methods of distribution through the landlord.

First, the sale of current to landlords at a wholesale rate for distribution to tenants as a part of the service covered by the regular rental charge.

Second, the sale to landlords who distribute through submeters at retail rates.

The first method is followed quite generally, without serious objection, in Alabama, Connecticut, Illinois, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Tennessee, and probably in other states.

In Virginia, however, the Virginia Electric & Power Company has had up before the Commission a rule prohibiting the distribution of current by a landlord to his tenants, even by including an additional amount in the rental to take care of the electric light and power service. The Commission seems to have taken the position in-

formally that the regulation should not apply where there are no separate meters placed in the separate offices or apartments that are rented and where there is no restriction placed on the tenants as to the amount of current that can be used.

So, too, in New Jersey it has been said that it is not against public policy if electric energy is sold to a landlord through a master meter to be distributed to tenants in a building as a part of the service supplied and included in the rent, and that this is not objectionable.*

ANOTHER practice—and the one which is generally the cause of disagreement—is for the landlord to buy current through a master meter at wholesale and resell it through separate meters to his tenants at retail prices.

To facilitate this method of distribution, meter companies have been organized in certain large cities. They furnish the submeters and, in a sort of partnership arrangement with the landlord, deal with the tenant. Many utility companies have refused service on such terms on the ground that they themselves should deal directly with the consumer, with the consequence that the whole question is up before the courts and Commissions for decision.

In New York state the submetering practice is widespread in Manhattan and the Bronx, has extended into Brooklyn and Queens, as far upstate as Syracuse, and into other states where New York submetering concerns have established branches. In Manhattan, the New York *World* tells us, the practice has spread from east side tenements to Park avenue apartments, and from the skyscrapers of lower Broadway to loft buildings in the cloak and suit and fur sections.

THE magnitude of the submetering controversy was revealed in recent proceedings before the New York Commission. On the one side appeared the electric companies and on the other side were representatives of submetering firms, real estate holders, landlords, and large industrial plants submetering current or conjunctive electric service. With the entry of real estate interests and industrial groups, forces representing billions of dollars were arrayed against the utilities.

In this case, involving the right to refuse service to submetering companies, Clarence J. Shearn, attorney for the Real Estate Board of New York and the Building Managers and Owners' Association, declared that the abolition of submetering in New York city would increase the burden of real estate holders, decrease real estate valuations from $140,000,000 to $280,000,000 annually, increase the burden of building operations, and benefit the ultimate consumer not at all.

It has been said in the New York controversy that if the companies succeed in eliminating submetering, many building owners will install private plants. This, it is argued, would so cut into the companies' business that an increase in rates would result, and it would, furthermore, result in aggravation of the smoke nuisance and

* Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329.

the traffic problem throughout the city.

This threat, however, does not appear to concern the utilities greatly. The New York *World* states that when this was brought to the attention of experts in no way connected with public utilities but thoroughly familiar with their operation, they merely smiled. In the first place, it was pointed out that sub-cellar real estate values in New York city are mounting by leaps and bounds, that a rental of from $1 to $1.50 a square foot is charged for the storage of inactive business records, and that this would be lost if the space were used for machinery. To this would have to be added the cost of expensive turbines and dynamos, cost of installation, depreciation on investment, maintenance with possibility of labor difficulties, fuel, oil or coal, and if the latter, the trucking of steam coal and ashes, the annoyance of added smoke in Manhattan—and all to produce current cheaper than the plants of the public utilities.

ONE of the arguments advanced by the submetering concerns in New York city is that a large number of meters were originally purchased from the public utility companies themselves, and that the electric utilities instituted the submetering system and encouraged the organization of submetering concerns. It has been testified on the other hand, however, that only one of the New York electric companies did this and that now it is trying to prevent an expansion of the system to other boroughs.

It was the opinion of Arthur Williams, formerly a vice-president of the New York Edison Company, that the practice of submetering had been a real benefit in the development of the electric industry. He stated that if submetering had not been the company policy, it would have been practically impossible to secure any of the contracts for supplying large buildings during the past ten or twelve years.

From the other side, however, we hear that if and when the submetering concerns are eliminated from the electric business in New York city, the utilities promise the users of their service the largest rate reduction ever made by a public utility. In the opinion of Matthew S. Sloan, president of New York electric utilities, if there were no middlemen in the situation, the users of electricity would get better service for $14,000,000 a year less than they now pay in the city of New York. He stated:

> "Our retail and wholesale rates to our other customers are kept unduly high because these submetering concerns get this $14,000,000. If they are eliminated we will use it all to reduce our rates."

SEVERAL interesting questions are here presented. Does this submetering and retail distribution constitute public utility service, and are the landlords and metering companies public utilities? Can they operate in this manner without Commission authority? Are they subject to Commission regulation? If the nature of their service is not such as to make their activities illegal, must an electric utility supply the current? Does discrimination between the tenants of such buildings and other consumers

result from this practice? And last, but not least, what are the rights of the tenants? Must they take service from the landlord or submetering company, or have they the right to deal directly with the electric company?

These questions are not settled, although in some states steps have been taken towards a solution of the problem.

Is a submetering company or a landlord reselling electricity performing public utility service? The owner of an apartment or office building who buys electricity measured by a master meter and retails it to tenants does not usually consider this to be a public utility enterprise. Such retailing of service to one or two tenants may at first seem quite another thing than the furnishing of public utility service to a whole community, but the principle may be the same; and when we stop to think that some of the large buildings contain as many inhabitants as a good sized village the analogy does not seem inappropriate.

The owner of such a building holds himself out as ready and able to furnish public utility service to all within his territory; that is, all within his building. The same reasoning would seem to apply to a company which submeters for the landlord.

SUPPORT for this theory is found in some of the decisions. In one of the most recent cases of this kind the New Jersey Board said:

> "The landlord in effect is performing some of the usual functions of the public utility company."*

* Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329.

Whether or not landlords are doing a public utility service in retailing electricity to their tenants, the fact is that in most states they are not treated as public utilities. The Pennsylvania law, for example, excepts from the definition of public service companies, producers of electricity who are not otherwise a public service company and who sell the commodity only to their tenants. While there has been no definite decision handed down in that state, it has been generally assumed that the term "producer" used in the act includes one who purchases the commodity and redistributes it to tenants.

The same construction has been followed in California, where the statute defining "electrical corporation" has a provision reading "except where electricity is generated on or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others."

An opinion rendered to the Maryland Commission in 1913 by W. Cabell Bruce, general counsel at the time, holds that an apartment house cannot be said to own, operate, manage, or control any plant or property even for selling or distributing electricity for light within the meaning of the statute defining electrical corporations. Such an apartment house in furnishing electric current only to tenants of the building, after obtaining the current from an electric utility, was not considered as holding itself out as prepared to sell and distribute current to the general public, but as supplying current to the occupants of the apartment house, merely as an incident of

The Two Methods of Distributing Electricity Through the Landlord:

1. *By the sale of current at wholesale rates to landlords, for distribution to the tenants, as a part of the service covered by the rental charge:*

2. *By the sale of current at wholesale rates to landlords who distribute current to tenants through submeters, at retail rates.*

its business. It was remarked that if the profit that it was making from electric current supplied by it to a tenant was thought by the tenant to be unduly irksome, he could escape the burden by giving up his apartment or apartments and going elsewhere.

THE Ohio supreme court has held that a realty company which has not dedicated its property to public use and does not hold itself out to serve electric current to the public at large is not a public utility because it voluntarily renders electric service to tenants and employees, and that such a company rendering service under a voluntary contract cannot be required to furnish such service at a rate less than that fixed by the terms of the contract.*

A step has been taken in the state of New York towards placing submetering companies under Commission jurisdiction. The Dunnigan-Story Bill, recently introduced in the legislature, would bring under the jurisdiction of the Commission persons or corporations which sell or resell electricity through private meters in apartment houses, office buildings, tenement houses and factories, where such energy is generated and sold by another person or corporation.

Where there has been no attempt to regulate the distribution of service to tenants as public utility service, we may concede the right to render such service and turn our attention next to the grounds on which a public utility company may refuse to supply the electricity for resale.

OPPOSITION by electric utilities to the resale of current to tenants rests partially upon the exclusive franchise right in a given territory and the right under public utility laws to resist competition. In a case decided by the New Jersey Commission it was stated that while the dispute was not between two electric light companies as to which should supply a certain territory, it seemed to the Commission that a similar principle was involved.*

Then too, there have been several decisions that a public utility company is not required to serve a competitor

* Jonas *v.* Swetland Co. (Ohio Sup. Ct.) P.U.R.1928D, 825, 162 N. E. 45.

* Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329.

for the purpose of furthering the business operations of the rival.†

The companies take the position that if unregulated submetering companies are allowed to do business where it is profitable and leave to the utilities the unprofitable, the utilities will find themselves engaged chiefly in the wholesale business with the most profitable part of their retail business lost to the submetering companies. This is declared to be economically unsound and unfair to the utilities. If the most profitable business is taken away, that means an increase in the rates of the remaining consumers, and the companies must necessarily lose by the smaller patronage which would result from higher rates.

IN outlining the stand of the electric utilities, Matthew S. Sloan, president of some of the New York companies, said:

> "I do not want to harm the property owners. My quarrel is with the submetering companies, and I think they should be done away with. I am against all forms of submetering. If it goes on so that $30,000,000 or $40,000,000 of our business is in the hands of these unregulated middlemen as may happen if something is not done to check the practice, we may have to ask for higher rates. Admitting that we have encouraged submetering in the past, we now recognize that it is wrong in principle and we want to do away with it."

The usual rule in the case of all public utility companies is that a public utility is entitled to collect the minimum charge from each consumer.*

From the viewpoint of the public utility the resale of service to tenants may be objectionable because the company cannot collect a minimum charge or service charge from each ultimate consumer and it cannot charge the higher rates which apply when small amounts of service are bought.

ANOTHER cause of complaint by the utility companies is that the rendering of service through landlords and submetering companies deprives them of the direct control over their service which is necessary if they are to perform their full duty to customers. Customers of submetering companies having difficulties with their services frequently charge their trouble to the utility, when in fact the trouble arises in the house distribution system. The utilities are then called upon to answer trouble calls, and as it is impracticable for the service department to distinguish between meter service customers and regular customers of the company, they often respond to calls and remedy service troubles of customers of the meter service company. It was testified before the New York Public Service Commission that an electric meter corporation did not maintain an emergency service for repairing equipment other than meters, and that when lights went out and some disorder occurred, the electric utility was notified and it made the repairs at its own expense.

The submetering companies are not required to test meters periodically or to maintain apparatus and equipment for testing meters, while an electric utility, operating upon a large scale in an extensive territory (if it provides,

† "Public Utility Service and Discrimination," by E. Nichols, p. 181.

* "3 Guiding Principles of Public Service Regulation" by H. C. Spurr, p. 480.

as it should, adequate service) must do more than maintain power houses, wires, and cables. Among other things, it must have adequate facilities for testing meters; it must keep proper records of the same and use every reasonable and practicable precaution to avoid error and injustice in dealing with its customers. It is in the public interest that a regular utility company which has developed an efficient organization for metering the current which it sells should, as long as it properly serves the convenience of those wanting such current, supply the meters required to measure it and be responsible for their accuracy.*

BEING deprived of direct relations with the utility so as to obtain trouble service and have properly tested meters is not the only disadvantage to the consumer under the submetering practice. Public policy requires that public utility service shall be rendered without discrimination at uniform rates to all, and for that reason objection has sometimes been made to the practice of substituting an unregulated landlord or submetering concern in place of a regulated public utility company.

One of the practical objections to the resale of utility service by landlords is the lack of uniformity in rates.

An owner of a single house may pay 10 cents per kilowatt hour for his electric current while neighbors in an apartment building may pay their landlord 8 cents per kilowatt as he in turn buys electric current at a low wholesale price which permits resale at 8 cents. The tenants, moreover, may be relieved of service charges or minimum charges. Or, on the other hand, the landlord may charge more than the regular rates. This result is not in harmony with the theory of nondiscriminatory public utility service.

From the standpoint of the ultimate consumer, another disadvantage of the submetering practice is that the amount of deposit exacted by the submetering customers is optional with the middlemen, and they are not required to pay interest on deposits. Each submetering company has its own methods of doing business.

IN the event of dispute as to a bill rendered, an electric utility cannot discontinue service to enforce payment without right of appeal by the customer to a Commission. Under such conditions it cannot be reasonably contended, says the New Jersey Board, that it serves the public interest for a considerable part of the public who live in apartment houses to be dependent for service upon meters installed by supply companies in partnership with landlords rather than to depend upon public utilities subject to regulation and control.*

A meter supply company, not a public utility, and not subject to regulations prescribed to protect the interests of customers, by buying current at the low quantity rate and selling at the utility's rate for smaller quantities might have a considerable margin of profit. If arrangements

* Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329.

* Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329.

between owners of apartment houses and meter supply companies, by virtue of which the latter are substituted for electric utilities in supplying service to tenants, are profitable, it would be natural for other owners to make similar arrangements. A multiplicity of such cases would take from the utility a large number of those who would be its customers.

"Removed from the protection to which if customers of a public utility they would be entitled, there would be no advantage, but a disadvantage to those served by the supply company," said the New Jersey Board. "Loss of customers would tend to increase the unit cost per customer of supplying service to those remaining and whom the respondent must serve." †

A STUDY of the rulings by courts and Public Service Commissions discloses general approval of the principle of a separate installation and meter to each customer. Service through one connection to more than one building except in certain instances when more than one building located near together are used in a single business is, moreover, not usually sanctioned.*

In a case in New York a provision of a rate schedule which permitted the lessor or owner of two or more buildings not more than 100 feet apart that might be served from one service to combine the current consumed to get the benefit of a lower rate was held to constitute unjust discrimination against the owner or lessor of a single building. It appeared in this case that there was a series of adjoining buildings which were separated by party walls in the front, but had a common open space in the rear. They were handled as one building by the lessee, which rented the stores on the street to various tenants. It was sought to pool the consumption of all these tenants and obtain a wholesale rate, instead of the rate in force when each tenant's consumption was billed separately. Commissioner Hayward said:

> "There can be no doubt that this conjunctional service rider in any form is contrary to the principle of 'one customer, one service, one meter,' which has been insisted upon by this Commission as the only principle which will give justice to all." †

Although the present submetering proposition is not on all fours with this question, the underlying principles should be kept in mind, while we study the few actual holdings on submetering of electric current to tenants.

IN a case before the New Jersey Board the utility company was ready and willing to supply service to the tenants of an apartment house. The evidence showed that a large number of tenants were willing to have the electric utility's meters installed in their apartments. It did not show that the tenants preferred that meters should be installed by a submetering company. They would have had no better rate if meters of the latter had been installed. The Board sustained the right of the electric utility to refuse service through a master meter for resale to the tenants.

† Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329, 336.

* See "Public Utility Service and Discrimination," by E. Nichols, p. 486.

† Realty Supervision Co. *v.* Edison Electric Illum. Co. (N. Y. 1st Dist.) P.U.R.1917B, 962.

The Board upheld the contention of the public utility company that it was not its duty to supply electricity at a quantity rate to be sold by the purchaser at a profit to those who otherwise would be its customers, and although electrical energy is property, it was held that it differed from other property in that its distribution and sale requires the use of public highways.†

The New Jersey Board has stated its opinion that where the electric energy is sold to the landlord to be sold in turn and distributed by him as a separate commodity in quantities measured by the installation of meters at rates to be fixed and determined by him as agent, it removes from the field of regulation an element of public utility activities which, under the policy of the state, should be subject to regulation. It seemed to the Board that this practice should be regarded as discriminatory and unlawful.*

IN reply to a contention that the Board should not interfere with the contractual rights of landlord and tenant, it was stated that the question involved was one of rendering safe, adequate, and proper service by a public utility in accordance with a statute.

In one state, where the resale of utility service has never been formally before the Commission, one of the Commissioners has stated that personally he feels that a public utility should have control over the sale of its commodity—subject, of course, to the exercise of the regulatory power, and that under no circumstances should the control of rates and service pass from the utility and the regulatory body to the hands of an individual. He expresses the opinion that undoubtedly in most instances a public utility would vigorously object to the plan of an individual controlling the sale of its service, and believes that regulatory bodies and the courts would sustain that objection if made by a public utility.

The Public Utilities Commission of the District of Columbia has recently decided that a regulation providing that electric service furnished to the consumer shall be for his own use and may not be remetered or submetered by the consumer for the purpose of selling electric service to others, is reasonable. Tenants of a building have the right to purchase electricity directly from the utility, said the Commission.‡

THE rules and regulations of many electric utilities, approved by the Commissions or filed with the Commissions without objection being made, contemplate direct dealings between the utility and the ultimate consumer. A tariff filed by the Brooklyn Edison Company, now under attack, for example, provides:

> . . . "the company's service for the separate use of tenants or occupants of multiple family houses will only be furnished directly to them through the company's individual meters, and will not be supplied through a master meter for submetering to such tenants or occupants."

† Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329.

* Sixty-Seven South Munn, Inc. *v.* Public Service Electric & Gas Co. (N. J.) P.U.R. 1929A, 329.

‡ Re Potomac Electric Power Co. (D. C.) Formal Case No. 203, Order No. 748, Feb. 29, 1929.

The rule indicates the practice in Alabama, New Mexico, Tennessee, and elsewhere.

In Wisconsin the utilities have had considerable discretion in their treatment of submetering. Some utilities in Wisconsin have rules providing that all service is to be furnished directly by the utility. The only case which has been decided by the Commission, apparently, arose in Beloit a number of years ago.*

In this case the Commission held that the practice of the Beloit Water, Gas & Electric Company in insisting on furnishing service directly to each consumer was not unreasonable. On the other hand a number of the companies, notably the Milwaukee Electric Railway & Light Company and the Wisconsin Gas & Electric Company are willing to, and do, supply energy directly to large building owners, permitting the resale of that energy to tenants by the owners.

The North Carolina Commission has approved a practice, which has grown to some extent where the owners of large office buildings use electricity for both power and lighting, of permitting the power to be purchased at a specific rate for this class of service and allowing the customers to transform such amount as may be necessary to step down for lighting purposes.

The practice of reselling electric service has been carried on, without objection and without any Commission rulings, in Connecticut, Michigan, Nevada, Oregon, and Washington.

The special committee on submetering, appointed by the real estate board of New York and Building Managers and Owners Association of New York, state that submetering prevails in Chicago, Kansas City, Omaha, Seattle, Duluth, Atlanta, Louisville, Cincinnati, Houston, Cleveland, Detroit, St. Louis, Dayton, Pittsburgh, Indianapolis, Spokane, San Francisco, Salt Lake City, Denver, and Boston. Whether there is utility opposition is not stated.

The Oregon Commission has never commented upon the practice of reselling electric service in apartments and offices but in certain of its orders has specified rates therefor. The electric tariffs generally provide a special resale provision for apartment houses, to-wit:

> "If the manager or owner of an apartment house will assume the payment of the bills for all electric energy consumed by the various apartments he may sign a contract for the total consumption and obtain the benefit of any quantity rate which may apply to the total consumption. The minimum charge will be based on the rate of $1 per month per kilowatt of lighting installation plus any additional minimum charge applying to heating, cooking, and power equipment. The company will furnish a separate bill for monthly consumption of each meter at the regular residence rate in addition to the bill for the total consumption applied under these schedule (A-6). The company reserves the right at its option to bill the management of the apartment house with the total consumption as measured by a master meter instead of the total consumption as represented by the sum of the individual readings of the apartment meters."

* *Re* Beloit Water, Gas & E. Co. (Wis.) P.U.R.1922E, 133.

In the case of electric utilities in Michigan, when the practice of reselling is permitted, permission is granted upon condition that the customer shall charge for such service the established rates of the utility for similar service under like conditions, and the utility neither furnishes nor maintains the meters for resale to ultimate consumers.

But the practice is said to be in vogue in the state of Connecticut in the larger cities of reselling electricity by owners of apartment or office buildings in some cases at a rate greater than that charged by the electric companies who serve their patrons directly.

Commissioner Williams, formerly of the New York Commission, First District, in discussing rates for electric breakdown service some years ago, said in regard to service furnished to customers who resold electric current to owners or tenants of adjacent buildings:

> "Undoubtedly the customer could compel the public service corporations to sell him the current whether he used it himself or resold it. The only thing the Commission is interested in is to see that this customer gets nothing by way of service or facilities that another customer consuming a like amount of current does not get. If the public service corporations furnished submeters or read them or performed any other extra service for this class of customers, it would be discrimination. I recommend that a change be made in the schedule pointing out the fact that customers may purchase current for resale in part and under what conditions the customer may do this, the meter or meters to be on the customer's premises in all instances, and any current to be resold to be measured by submeters, the public service corporations in no event to read or have any connection with them."

The Commission required that where any of the current delivered to a customer was resold off the premises, the master meters controlling the supply of current be located on the customer's premises and that the conditions under which resale by the customer off his premises might be made should be indicated in the service regulations. It was further provided that the supply of current to customers be through a master meter or meters as might be required for proper metering under the contracts and under the service conditions, and further that the current consumption and corresponding bills to customers be based on the registration of the master meter or meters, the utility to assume no responsibility for the installation or registration of any submeters provided by the consumer or their agreement with the registration of the master meter or meters. This case was decided at a time when the company itself did not object to furnishing electricity for resale.*

The question whether an electric utility could be compelled to furnish service for resale was not a point at issue before Commissioner Williams, and an authoritative decision as to whether submetering shall be approved is being awaited with great interest in New York, and also in other states where the problem has arisen.

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* *Re* New York Edison Co. 6 P. S. C. R. (1st Dist. N. Y.) 289.

Remarkable Remarks

GIFFORD PINCHOT
Ex-Governor of Pennsylvania.

"We are on the verge of seeing power, light, and transportation absorbed into one gigantic, nation-wide monopoly. When this monopoly has finished its growth, it will be the most gigantic monopoly ever known in the history of the world, and the most powerful."

An item in the "San Diego Union."

"A court has decided that a cow in the road always has the right of way. This indicates that the courts are just learning what the cows have always known."

MATTHEW S. SLOAN
President, New York Edison Company.

"The chief problem of the utilities under regulation is to make and keep themselves sufficiently prosperous to attract new capital."

THOMAS E. MITTEN
Chairman of the Board, Philadelphia Rapid Transit Co.

"The worst that can happen is industrial revolution. It is not impossible in America."

THORNE BROWNE
Managing Director, Middle West Division, National Electric Light Association.

"With the early railroad came the corporate individuals and a rapidly developing critical attitude from the public concerning these impersonal individuals. It kissed them as they arrived and spanked them shortly after with gusto."

JOHN SPARGO
Writer, lecturer and former Socialist.

"Every man who is at all familiar with the facts knows that this investigation (of the public utilities by the Federal Trade Commission), would not have been ordered by the Senate were it not that the campaign of malignant abuse and cowardly innuendo has caused so many of our servants in office to fear being branded as hirelings of the 'power trust.'"

R. H. BALLARD
of the National Electric Light Association.

"What better source have the schools for obtaining information on the electric light and power industry than from those engaged in its development? Do men consult a lawyer when they are sick, or a physician when they are in need of legal advice?"

T. O. KENNEDY
of the Ohio Public Service Company of Cleveland.

"The quickest way to convert a chronic kicker is to sell him $5.00 worth of (electric) service a month instead of $1.50 worth."

EDWIN A. AUSTIN
Supervisor of Motorbus Division, Public Service Commission of Missouri.

"There is little doubt but that the privately owned automobile is causing havoc in the dividends of the railroads."

E. D. SIMON
Ex-Lord Mayor of Manchester, England.

"It is largely this question of fares which makes the slum problem of London insoluble by ordinary means."

THOMAS J. WALSH
United States Senator from Montana.

"I note that in the propaganda carried on by the public utilities every one who has a word to say in criticism of their methods, or who under any circumstances whatever advocates the public development of power possibilities is set down as an incorrigible apostle of universal public ownership, a Bolshevik, and generally an undesirable if not a dangerous character."

WILLIAM GREENE
President, American Federation of Labor.

"The American Federation of Labor believes that wage payments should be entirely separate from profits or stocks owned."

WALTER M. W. SPLAWN
Professor of Economics, University of Texas.

"One may safely say that the (railroad) service rendered in the United States is equal to, if not superior to, that to be found in countries where the Government owns and operates railroads."

P. S. ARKWRIGHT
President, Georgia Power Co.

"Electricity has almost literally created the water powers. Not until the development of the electric generator and the transmission of electrical energy at high voltage was it possible to make any serious use of the power of rivers. They had remained unutilized for centuries, and but for the development of the electrical industry most of them would have continued to be wasted through all eternity."

LOUIS H. EMERSON
Governor of Illinois.

"Public ownership, which was such a bugbear to the early utility promoters, is coming rapidly, but it is coming in a way never anticipated in those early days. It is now called customer-ownership and employee-ownership."

MICHAEL FRAENKEL
Author.

"The 'service talk' that flows in such profusion among us, from the glib door-canvasser to the railroad director, is not all palaver and buncombe, as the cynical think. Much of it is the culture spirit speaking."

Showing the Utility Customer What He Really Pays For

A customer walked into the private office of the president of a water works company and complained about his bill. "Water is provided by Nature for the use of man," he pointed out, "and should be free."

The president promptly wrote this note to the superintendent of the reservoir:

"Please give John Doe, free of charge, all the water which he desires to carry away with him from our reservoir."

"But I don't want the water at the reservoir," argued the customer, "I want it at my house.'

"That delivery service," replied the president, "is what your bill is for."

—From the Modern Classics.

By M. M. ARGABRITE

VICE-PRESIDENT AMERICAN GAS & ELECTRIC COMPANY

RATE MAKING is not an easy task even for public utility company managers. These managers must call in the aid of rate experts; that means that not all men connected with a utility company are as familiar as they might be with the details of this rate making.

If this is the case in the utility organizations themselves, it is not to be expected that the public will know all about the various kinds of charges in their schedules and the bases for those charges. It is, however, of the utmost importance that the public should be acquainted, at least in part, with the essential principles upon which rate schedules are erected.

One fundamental proposition which both the electric industry, as well as the public should understand is, that the electrical utilities are not really selling electrical energy; they are selling electric service. If this point of view can be driven home, it will dissipate materially some of the misleading impressions that are prevailing.

WHEN a threshing machine man comes along with his thresher and his steam engine or gasoline motor and threshes the farmer's grain, it is not steam power or gasoline power that he is alone furnishing, but chiefly a service. It would be service that he offered even if the farmer owned the threshing machine and the thresher came along and supplied merely the power; it would be service that he offered if there were no machinery at all and the thresher appeared and offered to beat out the grain by hand.

So it is in the case of an electrical company. It furnishes the mechanical energy which, while much more

effective than human energy, performs the same kind of a service. The service is the important item rendered. That service is divided into units of energy simply for the purpose of measurement.

Even in the case of a company that supplies water; it is not the water but the service furnished that is the important factor. This fact, however, the customer does not always understand.

NOT long ago a man walked into a water works office and complained to the superintendent, that he resented his water bills, and especially large water bills, as water is provided by nature and it should be free.

The superintendent replied to him that if he would take the water in the way that nature provided it, he could have the water free; whereupon the superintendent gave the customer an order upon the attendant at the reservoir to allow the gentleman to have all the water he could carry away from the reservoir without charge. The customer replied when he read the letter to the reservoir attendant that he did not want the water at the reservoir; he wanted it at his house. The superintendent forthwith pointed out to him that it was not the price of the water of which he was complaining, but that it was the cost of the service. He really wanted the service of the water company in delivering it to his door.

EVEN in other lines of business, such as the corner grocery store where commodities are dealt with, the service rendered to the customer forms an important part of his bill. But many of the patrons of the grocer fail to understand this. Many a man rolling out into the country in his automobile finds that he can buy apples cheaper at the orchard than he can get them over the counter of his grocer, and he often wonders what the reason for the difference in the price is. He thinks there should be no difference. On the other hand, the farmer who is approached by the city man who comes out in his automobile and asks the price of the fruit, thinks he should get as much for it as the grocer in the city.

Both, of course, are wrong. Both fail to take into consideration the service required to take the apples to the grocery store in the city and hold them there for the convenience of customers and then to deliver them to the homes of the consumer. The grocer performs a service. He saves the customer the trouble of going out of town for his apples and he delivers them to the customer's house. The transaction is looked upon as a mere sale of apples, but really it is something more. The difference in price between what the grocer pays the farmer and what he gets from the customer represents what he thinks the value of that service to the customer is; failure to appreciate this often makes the buyers think they are being robbed because they pay more for goods than they would have to if they got them directly from the producer.

FAILURE of utility customers to realize what they are actually demanding and getting from the company leads to many unfounded complaints. For example:

It is not uncommon to hear a customer use the expression that he is willing to "pay for what he uses," but that he does not want to pay for anything he does not use. One cannot blame him for that. The customer simply does not know what he is using. The situation might be made clear to him by a simple illustration.

He would understand, for example, that if he rented a garage for $15 a month and used it one night out of the thirty nights in the month, that he would have to pay the $15 rental just the same, and he would understand why that charge would be fair. On the theory of the customer that he would pay only for what he uses, his bill would be only 50 cents instead of $15. By using the garage as an illustration, he would understand that the reason why he has to pay $15 is that he has contracted for the use of that garage, and that it stands ready for him to use; if he does not want to use it, that is his own affair. The investment is there waiting for him. Taxes, interest, depreciation, and service are all there, and if he wants to average a low price per diem, he must use it every day; if he does not wish to use it every day and will want it held for his use, then he must be willing to meet the monthly charge.

HERE is another illustration which might tend to make the situation clear to him. He might be reminded that if he reserves a berth on a train and fails to make use of it, nevertheless it is only fair for him to pay for it; the railroad company has reserved the berth for his use and was not able to sell it to anybody else. The customer would be quick to see that from the railroad's standpoint, he used that berth just as much as if he had slept in it; he contracted for it and had it tied up in his interest. The fact that he did not actually use the service made no difference in the cost of supplying it.

NOW let us consider the user of water. A water distributing company frequently will get its supplies from natural sources; these, to use the expression of the ordinary politician, are "God given." The water company probably has a fine well or a stream flowing into a reservoir. It probably does not do anything to that water except to trap it and turn it into the distributing system which it has built, putting a path from the distributing system and carrying the water to the consumer's home. The investment devoted to that consumer's interest is $100, $150, or $200; it may be any amount. Taxes, interest, depreciation, service men, are all at his disposal. There is a fixed charge of 10 per cent on the property devoted to the customer's use, whether he uses any water or not. That fixed charge may be $10 a year, or $20 a year. Is that consumer in a position to say that he is willing to pay for the water he uses, but does not want to pay for anything that is not used?

That customer is really not paying the water company for water. The water company will give him all the water he wants, if he will go to the reservoir and get it, because at that point it has not cost the company anything in particular in comparison to what it has cost the company to bring it to the consumer's door. What the

consumer really wants is the water service, and it costs the company anywhere from $10 a year on up to furnish that service.

Would it be fair for the consumer to pay the company a minimum bill of only 50 cents a month? That would hardly pay the costs of keeping their records. Thus we could go on finding all sorts of reasons why it is essential to have minimum bills. As a matter of fact, minimum bills in almost every instance are entirely below what they should be.

THE average user of a utility service fails to see that when he orders in a meter he is reserving facilities for his use and is imposing certain costs upon the company, or other consumers, whether he actually uses any part of that which is available or not. This item is to be considered, however, in rate making, and this element is what we might call a "per customer cost."

What is a per customer cost in the case of an electric company?

John Brown may use $1 worth of energy a month and his neighbor, Bill Jones, may use $10 worth a month. Yet it costs just as much to maintain the service, read the meter, keep the account, and handle the affairs of distributing energy to John Brown as it does to Bill Jones.

This element of cost depends upon the number of customers and not upon the amount of energy used. John Brown should, of course, pay the company for what it costs to put in his meter, read it, render bills, and perform other individual services, and he should not unload any part of that expense on to Bill Jones who has all he can do to square his own account. These individual or customer expenses are larger than they are ordinarily supposed to be.

IN order to arrive at some conclusion as to what these returns per customer costs amounts to, this company has had a large number of central station systems analyzed. Some of them run very high; some of them are very moderate, depending to some extent upon the size of the community, and to a still greater extent upon the type of the community. If a community is a compact and dense urban community, the per customer cost is likely to run comparatively low. If, however, the community served has a large outlying district where the lines are long, travel of the various men maintaining the service is excessive, the number of miles to keep up per customer is large, than the per customer cost is bound to be considerably higher even with communities with comparatively the same population.

This company has analyzed and compared two communities, each serving a population of between 40,000 or 50,000 people. In one, where the population was dense, these apparent per customer costs ran about $21.60 a year. In the community where the customers are spread over a large area these costs amounted to $33.12 per customer per year. Further investigation revealed that a large number of communities would analyze in the neighborhood of $33.

Any properly constructed rate schedule should make provision for the absorption of these charges.

There are many other considerations and factors of importance in

electric rate cases, including the demand factor, long and short hour use, diversity of use, and off-peak service. Some of them take lead into the technical field. The power factor for example.

Power factor is an innocent-sounding term but it is a terror when it works against one. And it is a difficult term to explain to the layman.

An alternating current generator produces what is called idle current under certain conditions. This idle current has a way of filling up the capacity of the generators and the transmission distribution and transporting facilities until half of the capacity may be tied up in doing no work at all. The result of this is to cut in two the amount of salable capacity at the disposal of the utility.

In the days before Mr. Volstead, a bartender would draw a glass of beer. That glass of beer might be half beer and half foam, or three quarters beer and one quarter foam or all beer and no foam. There would be no waste capacity in that glass if it were all beer. If, however, it was only half full of beer and the other half taken up by foam, it would have a "power factor" that would take away about half of the capacity in the glass.

So the rate-builder or the rate expert, must, in building his rates and especially rates for large power, take every precaution in designing his rates to preclude the possibility of a prospective customer giving the utility a fair power factor, and thereby saturating the system with current that is doing no work.

Sometimes one hears a customer asking why all those "fan-dangles" are put into a rate. The answer is that otherwise the company would be deprived of whatever use it might desire to make of its facilities, as they would be taken up by the idle current. Therefore, the ratebuilder must protect the company against this particular extravagance and the use of capacity.

IN protecting the company it is really the ratepayers who are being protected. That is the point the public must understand.

If one ratepayer is not made to pay for the expenses he imposes on the company, the expense must be paid by other customers. The company is entitled to a reasonable return upon the whole body of its rates. It is unfair to one class of consumers to be required to pay bills incurred by other classes of customers. What the company is able to do in providing for fair rate schedules is beneficial not only to it but to its customers, in the long run. The problem of the electric company is to get the greatest amount of use out of service that is available for use. This is beneficial both to the company and to its customers. If the electrical company were to put on an extra head of steam and convert its customers to the use of electric appliances, thus putting to use more hours a day of those facilities which are already at their customers' disposal and which are used only a very short period of time during the twenty-four hours, it will be rendering a splendid service. The excess cost to the customer is trivial. The commercial managers owe it to their customers as well as to their utility to load these facilities down and make them work.

¶ In the following article the author—one of the outstanding State Public Service Commissioners in the country—takes issue with some of the opinions expressed in a recent number of this magazine. The controversial nature of these two contributions give them a special interest to street railway utilities and to State Commissioners alike.

The Effect of Regulation on Street Railway Credit

Is It the Duty of the Public Service Commissions or the Utilities Themselves to Establish It and Maintain It?

By HAROLD E. WEST

CHAIRMAN, PUBLIC SERVICE COMMISSION OF MARYLAND

THE article by Mr. Simon J. Block on "Credit—What the Commissions Have and Have Not Done to Help the Street Railways Establish It," in Public Utilities Fortnightly of February 7, will no doubt be read by Public Service Commissioners and street railway officials of the country with surprise.

Mr. Block is an able and efficient stockbroker. His house is one of the most reputable in Baltimore. But his article, in my opinion, hardly proves that he qualifies as a Gamaliel at whose feet Public Service Commissioners should sit in the expectation of acquiring wisdom for the solving of knotty problems of utility regulation.

Mr. Block assumes that a Public Service Commission ought to be a sort of beneficient Providence for utilities, especially for distressed street railway companies, instead of being what the average Commission is—a group of hard-headed, practical men who seek to hold the scales even between the utilities and their customers. And when a Commission, instead of simply granting what is asked, requires a utility to prove its case, and bases its decision on the utility's *rights* instead of upon its needs or its wants, then it is "uncharitable" and "grudging." Many utility companies, when in a tight place, have fallen into the error of confusing needs with rights.

MR. Block starts out with the proposition that as the power to tax is the power to destroy, so the power to regulate is "the power to cripple and impair."

I disagree.

Public service corporations have their rights which the courts rarely fail to protect, and my observation is that Commissions are as conscientious in regarding the rights of the companies as they are in protecting the rights of the public. Any attempt on their part to "cripple and impair" would be met by an immediate and proper recourse to the courts, and it is an easily demonstrable fact that the

corporations are always more able to maintain their rights in the courts than is the public.

The following assertion of Mr. Block illustrates a common misunderstanding of the subject:

> "The Public Service Commissions originated in the theory that the public required protection against the aggressions of public service corporations. There was an indefinite fear that unless some deputized authority was constantly on the alert to forestall such things, rates and fares would be arbitrarily revised upwards, service tyranically curtailed and community need ignored.
>
> "After a decade or more of regulation and supervision by Commissions sitting in nearly every state, it has been demonstrated that such fears were groundless.
>
> "Yet in several instances our Public Service Commissions have been reluctant to outgrow that early theory of their origin *and this has narrowed the scope of their constructive usefulness.*" (The italics are mine.)

PUBLIC Service Commissions, as Mr. Block probably knows, originated as Railroad Commissions, and were designed to remedy very real and very grave abuses, such as the giving of rebates, the setting up of favored classes of shippers, the discrimination against localities, the control of city councils and state legislatures by means of corrupt political methods and a lavish distribution of free passes, and other things which need not be mentioned here.

In the early days regulation was confined almost exclusively to railroads. Its results were so excellent that the duties of these early Commissions were expanded to include the regulation of street railways, telephone companies, gas and electric light and power companies, water companies and lastly, the motor bus and truck companies. States which did not start out with Railroad Commissions made their laws broad enough at the outset to take in most of these various classes of utilities, as was done in Maryland, Pennsylvania, and other states.

THAT there was no real danger or "indefinite fear" in the public mind that rates would be arbitrarily raised is shown by the fact that in nearly every state utility rates had been fixed (as in Maryland), by legislative fiat, and that there was a perfect epidemic of two-cents-a-mile railroad rates established by state legislatures before Commission regulation became general. There was no such "early theory of their origin," which the Commissions could reluctantly outgrow, and the constructive usefulness of regulating Commissions has grown constantly and tremendously instead of being narrowed, as the utilities themselves will testify. It might be added here, in reply to the charge that the constructive usefulness of the Commissions has been narrowed, that if it had not been for the power of the Commissions to set aside legislative rates and, when this was proved to be necessary, their unflinching performance of that duty in the face of tremendous popular objection and disapproval, utility corporations from one end of the country to the other would have been forced into bankruptcy before they could have gotten relief from the legislatures or the courts, in the period of skyrocketing prices for labor and material after 1915.

WHAT Mr. Block means when he says the most satisfactory service is rendered by a "helpfully super-

vised monopoly of service" is not so easy to understand. Utility regulation is based on the theory of utility operation controlled as to rates and service, protected from competition so long as the utility can and will render adequate service at rates fair and just alike to company and customer, and no more than the service is worth. If, by "helpfully supervised" Mr. Block means that when a utility gets in trouble the Commission should act as *accoucheur,* then lay the credit baby on the public's doorstep to be taken in and wet-nursed, and the utility be thus relieved of providing for the brat itself; then he has mistaken the duties, obligations, and functions of Public Service Commissions.

The particular case which Mr. Block uses as an illustration of the shortcomings of Commission regulation is that of the United Railways & Electric Company of Baltimore. It is, as he says, particularly pertinent and illustrative; not however as narrowing the scope of the "constructive usefulness" of Commission regulation, or of giving "grudging relief"; but of careful and patient investigation, long study, and an honest effort to do justice between the Company and the public. For this case has been with the Commission for many years —from 1918 when the Commission began the hearing which resulted in setting aside the legislative rate of 5 cents and increased the fare to 6 cents, which was what the company asked, until now, and through successive fare increases to 6½ cents or two for 13, 7 cents straight, two for 15 with 8 cents flat, 7½ cents, 8⅓ or three for 25 with 9 cents flat, to 8¾ or four for 35 cents with 10 cents flat.

WHAT Mr. Block says in his article on credit about the United and the Commission, he has said, and more, in the monthly market letters of the firm of Nelson, Cook and Company, of which he is a member. So our Commission is reasonably familiar with his ideas, which are all right, perhaps, from the stockbroker's point of view, but wrong from any proper conception of utility regulation. That he does not fully appreciate the functions of utility Commissions is shown by his statement that "these essential transportation agencies (street railways) have received litle sympathy and less assistance from supervisory Commissions."

It is not the function of Commissions to be sympathetic toward railways or any other utilities, certainly not at the expense of the public; nor to give them "assistance," if by that is meant, authorizing rates greater than they are fairly and justly entitled to receive; because their needs for the maintenance of their credit or the keeping up of the price of their securities are in excess of their just dues.

And yet, no utility under the jurisdiction of the Maryland Commission has received more sympathetic attention to its claims; there is none whose problems have been more studied and worried over by the members of the Commission than those of the company to which Mr. Block directs particular attention. The Commission has done this because it knows the service given by the company is essential to the comfort and well-being of

the community, and a breakdown of that service, from any cause whatsoever, would be akin to a disaster. That it did not get the 10-cent straight fare which it asked the Commission to establish, and is now seeking through the courts, was because the Commission did not feel it was entitled to it and does not now believe it is entitled to it. Moreover it does not believe a 10-cent straight fare would solve the company's problems any more than the successive increases in fares since 1916 have solved them.

THE Maryland Commission believes that the maintenance of a proper credit is as essential to the proper maintenance, operation, and extension of a utility as it is to a steel mill or an automobile factory. Let there be no mistake about that. But it also believes that the maintenance of its credit is a corporate function, and not a duty of a Public Service Commission.

It is the duty of the Commission to see that the rates charged by a utility are fair and just to the utility and the public alike, and no more than the service is worth. If a utility can maintain its credit on such rates, well and good. If it cannot, it is regrettable, but there's nothing Commissions properly can do about it. Certainly fares or rates cannot be raised primarily for the purpose of maintaining credit.

Mr. Block points out that the steam railroads "are unusually fortunate in one respect—they have unimpaired credit facilities." That is true, but how did they get their credit facilities, and why are they unimpaired? Did the Interstate Commerce Commission ever raise rates for the purpose of establishing railroad credit? I think not. Does not the Transportation Act of 1920 *limit* earnings to 6 per cent on the value of the companies' property and provide for the recapture of half of earnings in excess of 6 per cent? I think so. Were not the railroads taken over by the government when we went to war, and later turned back in such bad shape that billions had to be spent on them to restore them to their previous condition, the government only paying part of this cost? I think so. Have they not suffered from bus, private automobile, and motor truck competition to the extent of losing a large percentage of their short-haul passenger business, and nearly all of their package freight business, particularly on hauls of 100 miles or less? I think so. Then why is their credit situation so good?

NOW let us analyze the United Railways' situation a bit. Mr. Block says:

> "Some years ago the United Railways & Electric Company of Baltimore was obliged to extend whatever service the Public Service Commission of Maryland required and to operate at any rate of fare which the Commission might fix. This was practically without appeal on any fundamental question, because neither the Commission nor the railways company was in position to assert what was a fair return upon *investment* since no *valuation* had been placed on the property." (The italics are mine.)

Mr. Block should know that no effort was made by either company or Commission to figure a return on *investment*. The amount of investment could have been determined with reasonable accuracy at any time. Invest-

ment was never an issue and there was no reason for any appeal on any issue involving investment. Rate of return was not an issue until after the valuation of the company's property was established in 1925. In the fare cases subsequent to 1925, rate of return on *value,* not investment, was an issue.

If Mr. Block were more familiar with the situation, he would not have said that the company was obliged to extend whatever service the Public Service Commission required. With one exception, whenever a zone extension was made it was agreed to by the company, the rate of fare to be established was based partly on the cost of making the extension, and in the case in which the fare was raised from 7 to 7½ cents the increase was made almost entirely for the purpose of making zone extensions and adding facilities. It was estimated, if I remember correctly that the fare increase would yield a gross of $1,200,000, of which more than $900,000 were to be expended in zone extensions and improved facilities. The company cooperated cordially and to the fullest extent in working out those improvements to service and estimating their cost.

It is true, however, that when the value of the company's property was established in 1925 (the figures were $75,000,000), both the company and Commission had something definite to go on, so far as a rate base was concerned. As investment in the property was not sufficient as a basis, the Commission had, prior to the valuation, adopted the policy of allowing rates which would enable the company to earn from one and one-third to one and one-half times the amount of its fixed charges. It was estimated that this would yield a balance to surplus of $1,000,000 as a minimum, and $1,500,000 as a maximum. In its opinion [P.U.R.1920A, 1, 65] announcing this policy the Commission said:

> "But in fixing $1,000,000 as the minimum balance to surplus which the company should be permitted to earn under existing conditions, this Commission is not to be understood as undertaking to guarantee such balance to surplus at the expense of the public at any and all hazards.
>
> "It will be noted that we have conditioned our conclusion as to such balance to surplus, first, upon the exercise of reasonable efficiency in the operation of the property; second, upon the exercise of reasonable economies, and, third, upon the expenditures of no more that reasonable amounts for the maintenance of the property and of its accident and depreciation reserves."

In the 6-cent fare case, decided January 7, 1919, the Commission pointed out that the increase of fare from 5 to 6 cents would produce net earnings of approximately one and a third times the company's fixed charge, "a ratio by no means excessive in view of the desirability of upholding the credit of the company."

Later in the same opinion [P.U.R. 1919C, 74, 99] the Commission said:

> "This Commission is fully mindful of the desirability of upholding the credit of all public utilities subject to its jurisdiction, to the fullest extent consistent with justice to the general public. But it is also fully mindful of the ultimate dangers of a false credit bolstered up by orders establishing rates for services which are not justified by the fair worth of the service rendered."

The foregoing is what I suppose Mr. Block refers to when he says:

> "Years before, the Public Service Commission of Maryland, as then constituted, laid down the wise regulation that a utility

> corporation must be permitted to earn sufficient revenue in excess of reasonable dividend requirements to enable it to maintain a high credit standing. The present Commission evidently lost sight of that wise axiom."

Does what the Commission said mean what Mr. Block's interpretation of it means? Is there anything in what the Commission said about dividend requirements, reasonable or unreasonable?

THE position of the present Commission on the desirability of utilities maintaining their credit is precisely what it was when the opinions heretofore quoted were written. It has not lost sight of anything in that connection.

As no value had been found for the property prior to 1925 the one and one-third to one and one-half times fixed charges rule was a rough and ready plan of dealing fairly and justly with the company. After the company asked for and received a valuation of its property, however, the old plan was no longer applicable and the company became entitled to a rate which would yield a fair return on $75,000,000 provided the rate was not in excess of the fair worth of the services rendered. And out of that rate the company is supposed to protect its own credit.

It must be remembered that the rate base of $75,000,000 does not represent *investment,* or what the builders of the property put into it, but what it would cost to reproduce that property at present-day high prices, plus intangibles and overheads, a generous allowance for going value, and $5,000,000 for its easements in the public streets of Baltimore city, for which of course it paid little or nothing, directly.

THE company did ask for a rate of return of from 7½ to 8 per cent on the $75,000,000 of tangible and intangible value which would have necessitated a straight 10-cent fare, and the Commission did refuse to grant it. Instead, it granted a base rate of 8⅓ cents when three tokens were bought for 25 cents, or 9 cents flat. The Commission did not, as Mr. Block asserts, fix 6.26 per cent as a fair return on valuation. The Commission fixed a rate of fare, not a rate of return. It figured out that the rate of fare, according to the best estimates it could make would yield a return of 6.26 per cent on the whole of the $75,000,000 of value as found, and so stated, for informative purposes only. It is significant in this discussion of credit that the day after the announcement of the *increase* of fare from 7½—2 for 15 cents or 8 cents flat to the 8⅓—3 for 25 or 9 cents flat, the prices of the company's securities broke on the local stock exchange.

MR. Block says the Commission fixed a 6.26 per cent rate of return "despite the fact that the Consolidated Gas, Electric Light & Power Company had been allowed 7½ per cent and the local telephone and the other utilities had been treated with equal fair liberality."

Has he forgotten that about three years ago, following a decision from a United States Statutory Court, which set aside a decision of the Commission refusing to increase telephone rates, the Commission established

telephone rates on a basis of a 6-per cent return on the value of the company's property, the value having been raised above Commission figures by the court?

The court declared that a return of 6 per cent would not be confiscatory. The telephone company apparently still is satisfied with that rate of return.

THE Commission did and does allow the Consolidated Gas & Electric Company to earn a return of from 7 to 8 per cent, but it does so because the rates of the company are low—lower than they were in pre-war times. On such a rate of return the price of service to the consumer is "not more than the fair worth of the service rendered," and that price will again be reviewed in the near future.

When the railways company, early in 1928, was refused a flat fare of 10 cents it appealed to the courts. The Court of Appeals sustained the Commission so far as the rate of return was concerned. The Commission having established the depreciation allowance on cost instead of on value, the court set aside its allowance for depreciation and directed the Commission to make the allowance on value. The Commission did so, fixing approximately $1,600,000 as the proper amount, almost twice as much as it previously had been allowed for this account.

This necessitated a further increase in fare. Mr. Block says "a fare of 10 cents was grudgingly authorized, but was immediately nullified by an order requiring the company to sell 4 tokens for 35 cents." This seems to be a misrepresentation of the fact as is shown by the following quotation from the order of the Commission in fixing the rate of fare which Mr. Block mentions:

> "The United Railways & Electric Company of Baltimore shall be permitted to charge and collect for the transportation of persons over its several street railway lines in Baltimore city and vicinity a base rate fare of 8¾ cents when tickets or fare checks are purchased or 10 cents cash for the conveyance of each passenger over twelve years of age."

MR. Block closes his article with the mandate that "the credit of public service corporations must be as zealously guarded by the Commissions as by the corporation itself," and he ends with this observation:

> "A Public Service Commission should regard itself as the guardian of corporate credit as well as the guardian of public service. Impairment of the credit of our street railway systems from whatever causes, but abetted by Public Service Commissions in overzealousness to hold down car fare—is directly responsible for the unsatisfactory street railway situation throughout the country."

To which, I only can say that I disagree.

NOW let us have something about street railway credit from the point of view of Maryland's utility regulating authority, and with particular reference to the Baltimore company, which Mr. Block uses as his example of Public Service Commission persecution.

In the first place, the company has tangible and intangible property valued by the Commission at $75,000,000. Against this it has outstanding securities, in round figures, of a par value of $85,000,000. Of this amount $65,000,000 is in bonds of various classes, and $20,000,000 in common stock. Its total capitalization is,

therefore, $10,000,000 in excess of its value—$10,000,000 par value of securities with no value at all behind them. Eliminate the excess if you will, and you then have a capitalization equal to value, but it is composed of $65,00,000 of bonds to $10,000,000 of stock, or a ratio of bonds to stock of 6½ to 1. A ratio of 3 to 1 is high.

With the Consolidated Gas & Electric Company which Mr. Block cited for a rate of return comparison, the ratio of bonds to stock, after some new financing immediately to be done, shall have been completed, will be 11 to 10, or nearly 1 to 1. The capitalization will be $109,841,482, of which there will be $33,043,105 no par common stock, or 28.99 per cent; $21,270,300, preferred or 18.66 per cent, while the bonds will amount to $59,666,000, or 52.35 per cent of the total capitalization. Incidentally that company has just received Commission approval of an issue of $10,500,000 of 4¾-per cent bonds to be used in calling of about the same sized issue of 6-per cent bonds at 105, and will issue over 100,000 shares of no par common stock at 60 and $1,000,000 of preferred at par of $100. Its common and preferred stock is in big demand, the common selling on a lower yield basis than the company's bonds. It has no trouble about its credit. The explanation of all this is that it has a monopoly in its field, its business is constantly growing, and its rates are constantly decreasing.

In the second place, neither the Baltimore street car company nor any other similar company has a monopoly of the transportation facilities in the city which it serves.

In every city the transportation situation is acutely competitive. While the Commission can and does protect the local company in its monopoly of transportation on rails and prevents motor bus competition, neither it nor the company can prevent or even check the competition of the private automobile. And every increase of fares drives more and more persons to automobiles. And every increase in the use of automobiles not only takes more traffic from the street car company, but slows up and makes more difficult street car operation; thereby driving more car riders to automobiles for the sake of their greater convenience and speed. It works around in a circle.

The fare fixed by the Commission yields as great, if not a greater rate of return than is being earned by any other street railway system in a city of comparable size in the country. The Commission in the successive fare increases has provided for every increased cost of doing business, as these increases occurred, and in the last increase practically doubled the amount allowed for depreciation by basing it on value instead of cost, in accordance with the decision of our Court of Appeals. The one thing it has not done is to fully provide for the losses caused by the falling off of business. In other words, it has declined to penalize the riders who continue to patronize the company, by making them pay for all the losses caused by those who abandon the car service for automobiles. It feels it has about reached the limit to which it can go in that direction.

The troubles of the company largely are due to this falling off of patronage. If riding had continued as it was in 1926, even without increasing at the normal rate of growth of the city, it is not likely there would have been any credit or other financial troubles. In that year the company carried 225,255,833 revenue passengers. In 1928 the riding had fallen off to 200,466,304, or a loss of about 25,000,000 passengers in two years. The net income for 1926 was $984,949 while for 1928 it dropped to $558,393, a loss of $426,556 in two years. And late in 1928 the fare increases of 8⅓ and 8¾ cents occurred. In December last, the riding fell off 2,382,803 revenue passengers over December, 1927, or 12.57 per cent. And the falling off does not appear to be at an end.

THAT an increase of fare does not seem to be the remedy is shown by these figures:

For December, 1928 and January, 1929, car earnings increased $74,935 over the corresponding months of 1927 and 1928, or 2.77 per cent. In that time there had been increases of fare from 7½ to 8¾ cents, or 16.67 per cent. So we have for two months an increase of fares of 16.67 per cent with an increase of revenues of only 2.77 per cent.

In view of the situation as it actually exists, the maintenance of the company's credit does not seem to be so simple that it can be solved merely by increasing fares. Investors, not speculators looking for a quick turn of the market, look at these things. When they see a company with such a top heavy financial structure, and with $10,000,000 par value of securities with no value behind them, a company faced with a kind of competition that can neither be regulated nor controlled; with a diminishing business; when increases in rates do not yield anything like commensurate increases in revenues, is it any wonder they demand a high yield on their investment when they buy its securities?

I will tell Mr. Block why the steam railroads are in so much better credit situation than the street railways, in spite of the fact that the net railway operating income of the Class 1 railroads for 1928 was equivalent to a return of only 4.71 per cent on their property investment, or value as established by the Interstate Commerce Commission; and in spite of the fact that passenger traffic was lighter than it had been in the last twenty years, and 7.8 per cent less than it was in 1927.

It is not because the railroads are charging all the traffic will bear, or anticipate an increase in rates. If the railroads should win the St. Louis and O'Fallon valuation case before the Supreme Court, and be able to secure rates based on present-day values of their properties, it is doubtful if any large company would attempt to do so. I think that situation is largely academic so far as its effect on rates is concerned.

The reason the credit situation of the steam railroads is good is because, in the main, their financial structures are properly proportioned, and because, in spite of the competition of the bus, truck, and private motor car, they are doing a big business, a busi-

ness that, if it falls off in one direction, usually picks up in another. Generally, their business is increasing instead of diminishing.

The sound way to strengthen the credit of street railways, it seems to me, is not to increase rates but to increase business. Can it be done? I do not know. The problem calls for the wisest and most sagacious management; management with vision and courage and resourcefulness—and a certain amount of ruthlessness if that be needed; management that will not hesitate at measures as severe as a major surgical operation if they are required to adjust their companies to the requirements of the people they serve, and to build up their business.

And in the work they will receive, I am sure, the hearty co-operation and assistance of the regulating Commission as far as this can properly be given.

A New Industry in Town Is Not Always a Blessing

ONE man who has been a problem to all of us is the local enthusiast. He may be a Chamber of Commerce secretary, or he may be some real estate man; but whatever his activity may be, he wants to have a big payroll in a town, and he goes about it saying:

"Here is this big industry that we can get here; if we do, we will have three or four hundred more people on our payroll."

This is a popular cry. But we do not always know whether the industry we are asking to come into our community is good for the community. Local enthusiasm may be aroused and subscription lists started without proper investigation. Usually our public utility company is at the top of the list for subscriptions; to support a popular movement of this kind, if it is for the public good, is a good policy from a public relations standpoint. But we have found that such movements are not always helpful to the community.

So we have been making industrial surveys to determine if the community likes the industries that already are located there. If it does not, it is not a good place for a new industry to come to.

We determined that the most helpful thing we can do for a community is to make the industries that are already there prosperous, going concerns.

—JAMES C. KENNEDY.

WHAT READERS ASK

Out of the mail bag of the Editor have come these questions; because they touch upon subjects of broad interest to those in the public utilities field, they have been selected for publication—together with the answers. What questions do *you* want to ask?

QUESTION

Are Public Service Commissioners required to be lawyers?

ANSWER

In the great majority of states that have Public Service Commissions the Commissioners are not required to be lawyers. In no state are all of the Commissioners required to be members of the legal profession. In Georgia, one of the three Commissioners must be "experienced in law;" in Maine one Commissioner must be "learned in the law;" in Michigan one must be an attorney; in Nevada one must be "an attorney versed in utility law;" in Ohio one must have a "knowledge of railroad law;" in Virginia one Commissioner must have "at least the same qualifications required for a Judge of the Supreme Court of Appeals" of that state; and in Wisconsin one must have "knowledge of utility law."

QUESTION

Who is responsible for creating the Public Service Commissions?

ANSWER

It would be difficult, at this time, to name the individuals responsible for state regulation of public utility companies, but the regulatory idea originated in this way:

Following a period when public opinion was committed to *laissez-faire* or "let alone," a campaign for regulation began with the Granger movement in the Middle West, the Windom Report to Congress in 1874, and the Report of the Hepburn Committee of New York in 1879. Commissions were created in Iowa, Minnesota, and Wisconsin in 1874 and in Illinois in 1871. The Wisconsin Act was called the "Potter" Law. All of these acts, except the Illinois Act, were repealed in 1876. They were re-enacted in Iowa and Minnesota. Fact-finding Commissions were established by Rhode Island in 1836, by New Hampshire in 1844, by Connecticut in 1853, by Vermont in 1855, by Maine in 1858. Georgia in 1879 established a Commission and in the same year California provided in its Constitution that the legislature establish a Railroad Commission with power to fix minimum rates. The Michigan Commission was established in 1889.

A bill for the establishment of a Commission was introduced in Wisconsin in 1889, by Hon. H. A. Taylor (afterward Pacific Railway Commissioner and Assistant Treasurer of the United States), but it was defeated. It was defeated again in the 90's and then was held in abeyance by Governor Robert M. La Follette and his supporters until the anti-pass, taxation, and primary election issues had been disposed of. Finally in 1903, following Governor La Follette's special message to the legislature, the bill was again introduced, but defeated. The governor stood for re-election in 1904 on that issue, and after his re-election the bill was enacted in 1905.*

The Public Service Commissions Law of New York was enacted by the legislature in 1907, following a message by Governor Charles E. Hughes, January 2, 1907, recommending such legislation. Governor Hughes in his message to the legislature pointed out that there was a Board of Railroad Commissioners consisting of five members having practically no power except to recommend action by the legislature. There was also a Commission of Gas and Electricity, consisting of three members. It was objected by the Governor that these Commissions were not so satisfactory as one Commission with broad powers would be, since similar questions and sometimes the same corporations were involved in proceedings before the Commissions. The abolition of the Board of Rapid Transit in New York city and the establishment of a new Board, with power

* "The La Follette Railroad Law in Wisconsin;" *Review of Reviews* (1905) Vol. 32, p. 76, by Professor John R. Commons, University of Wisconsin.

also to regulate gas and electric service was recommended, and this went into the new law.

By 1869, over a thousand statutes had been passed in Massachusetts to define the legal position of the railroads, this resulting in considerable confusion. A Railroad Commission was created in 1869 after unsuccessful attempts at legislative regulation. The Gas Commission was created in 1885, apparently on the demand by coal gas companies and also consumers. The coal gas companies were facing strong competition by water gas companies and by electric utilities. They asked protection from the state, and in turn were willing to submit to regulation. In 1876 the Choate Commission pointed out the necessity for a regulatory Commission. In 1880 the Mayor of Cambridge petitioned for such a Commission. The agitation finally resulted in the Gas and Electric Commission of 1885.*

QUESTION

May a utility company sell and encumber or otherwise transfer its property without Commission authority?

ANSWER

The following states require Commission approval for the sale, lease, mortgage, transfer, consolidation, or merger of utility company properties:

Alabama, Arizona, California, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Wisconsin, Indiana, Illinois, Maine, Minnesota, Missouri, Tennessee, North Dakota, and Vermont.

The law of Colorado apparently requires Commission approval of transfer of franchises and certificates.

In the District of Columbia the consolidation merger or corporate reorganization of street railways require the consent not only of the Commission but also of Congress.

In Kentucky the consent of the Commission is required for the consolidation of certain utilities, but the railroads appear to be free to transfer their properties without such consent.

QUESTION

What qualifications are required for membership in State Railroad or Public Service Commissions?

ANSWER

Very few states require any qualifications for the office of Commissioner beyond formal restrictions as to citizenship and voting ability. In fifteen states there are age limits. There is, too, a common restriction as to indulging in other activities while holding the office of Commissioner and as to holding stock or control in utilities while in office. In only a few states is there any professional qualification.

In Georgia, one of the three Commissioners must be experienced in law and one with the railroad business. In Kansas one must be a "practical, experienced business man" and one must be "experienced in the utility business." In Maine one Commissioner must be learned in law, one a civil engineer familiar with railroads and one experienced in utility business. In Michigan one must be an attorney, two others must be familiar with utility operation. In Nevada one must be an attorney versed in utility law, another must be a practical railroad man and the third must have knowledge of utility business. In Ohio one must have knowledge of railroad law and two others must be familiar with the utility business. In Virginia one Commissioner must have at least the same qualifications required for the judge of the Supreme Court of Appeals of that state. There is no qualification restriction for the other members of that Commission. In Wisconsin one must have knowledge of utility law and the others must understand utility business.

QUESTION

Is a radio broadcasting station a public utility?

ANSWER

We understand this question is not intended to include the transmission of code messages for pay by radio, but only the broadcasting of news, entertainment, and instruction free to the great radio audience. Nobody knows whether a radio broadcasting station is a public utility. The question cannot be answered positively until the supreme court passes upon it. History has often demonstrated that it is unsafe to assume the role of prophet, and so we shall not attempt to prophecy how the supreme court will answer the question whether a radio station broadcasting entertainment is a public utility.

Radio broadcasting is a very novel activity which is of great interest to the public; but a radio station does not require the use of the highways of the country in order to serve its audience. It does not charge for its entertainment or instruction. It has no monopoly of the air.

There is not much use of having a business declared a public utility unless its rates can be regulated. The only rates a broadcasting station has are those charged advertisers or others who use its facilities for transmitting their messages to the public. From the rate

* "Origin of Utility Commissions in Massachusetts;" *Journal of Political Economy*, Vol. 29, p. 177.

angle the situation of the radio broadcasting station is peculiar.

The nature of the information and entertainment, also, is not such as to make it a necessity—such as railroad, water, gas, electric, and telephone service have become.

We think it would be unsafe to jump to the conclusion that radio broadcasting is public utility service.

QUESTION

Do State Public Service Commissions have jurisdiction over utility companies operated by the states or by the Federal government?

ANSWER

No. We feel like saying a little more on this subject, but perhaps it will be better to stick to the short answer we have given.

QUESTION

Can you give a single reason why a State Commission should have the power to fix the rates of a public utility company in a city, rather than the City Council?

ANSWER

There are several reasons in favor of State Commission regulation given by the advocates of that theory, but as you have asked for a single reason, we will give but one. A rate dispute is virtually a dispute between the utility company and a large number of inhabitants of the city. The members of a City Council usually consider that it is their duty to represent only the ratepayers; therefore they represent only one party to the dispute. Besides, the members of the council are probably themselves ratepayers, and therefore have a direct personal interest in the outcome. If the city council had power to pass upon the question, it would be able to act as judge of its own case. This is generally regarded as bad practice.

A State Commission, composed of Commissioners most of whom are chosen from other parts of the state, are better able to decide questions fairly in which they are not interested, than are those who have a personal interest in the result. If one of the members of the State Commission were a citizen of a city in which the controversy arose, it would be good practice for him not to sit in the case. Hence, one very good reason for having rate controversies decided by State Commissions rather than by local authorities who are directly interested, is that the decision is apt to be more fair.

A Dream of Empire

FORTY-FIVE years ago a buggy, drawn by two tired horses, came slowly along a woods road in South Florida, to where a contractor's crew was at work. In the buggy sat a very ordinary-looking man.

"What are you doing?" he asked the contractor.

"Building a railroad for a foolish man," was the answer.

"Who is the foolish man?"

"Henry B. Plant," the contractor replied. In return he asked:

"What is your name?"

"I am Henry B. Plant."

Later, when the young contractor asked for advice, Plant said:

"Some day this railroad will be part of a great system that will serve all South Florida. Stay here and a city will grow up around you."

The former contractor is now Congressman Herbert J. Drane. And the railroad is part of the main line of the Atlantic Coast Line Railroad Company. Where Plant talked to his contractor in the virgin pine forest, the city of Lakeland has risen.

In such fashion have the dreams of the early railroad builders in Florida been realized.

The Make-up and the Menace of the "Power Monopoly"

Gifford Pinchot differs with the Federal Trade Commission in its conclusions on the existence of a power trust in this country

By HENRY C. SPURR

GIFFORD Pinchot, former governor of Pennsylvania, has published a 256-page pamphlet entitled: "The Power Monopoly; Its Make-up and Its Menace."

Coming from a man who has been a Federal official and the governor of a great state, and who has given long and disinterested study to the subject, it will be read with more than casual interest.

It is rather a formidable looking document, its bulk considered; but the average reader will not care to look beyond the first sixteen pages in which Mr. Pinchot sets forth his conclusions as to the make-up and menace of the so called "power monopoly."

In judging the value of Mr. Pinchot's contribution to this much-discussed subject, one may well be guided by two established rules of evidence which prevail in courts of law. These rules are:

A witness who is not an expert must state the facts as he knows them, not his opinions or conclusions as to what has taken place.

An expert witness may state his conclusions; but those conclusions must be based upon facts which have been testified to.

Mere conclusions of lay witnesses and conclusions of experts not based on facts are ruled out for obvious reasons.

TRIAL lawyers have to be constantly on the alert to hold lay witnesses down to statements of facts. Courts and juries want to know what the facts are. They may then draw their conclusions as to what those facts mean. The tendency of persons on the witness stand, however, it to give their own conclusions as to the facts, rather than the facts themselves.

It is quite a common failing, this inability to distinguish between conclusions and facts. Conclusions are often stated as if they were facts, and accepted as facts instead of mere conclusions or opinions.

This may be illustrated by an excerpt from the faithful report of the memorable trial of Bardwell against Pickwick. Samuel Weller is on the stand under examination.

> "Oh, you did get a talking about the trial," said Sergeant Buzfuz, brightening up in anticipation of some important discovery. "Now what passed about the trial; will you have the goodness to tell us, Mr. Weller?"

"Vith all the pleasure in life, sir," replied Sam. "Arter a few unimportant obserwations from the two wirtuous females, as they has been examined here today, the ladies gets into a very great state o' admiration at the honorable conduct of Mr. Dodson and Fogg—them two gen'l'men as is sittin' near you now."

This statement of Sam's as to "unimportant obserwations" and "very great state o' admiration at the honorable conduct" of Mr. Dodson and Fogg, and so forth, were mere conclusions. The *fact* which served as the basis of the conclusion was what the ladies actually said.

A SIMPLE illustration of the difference between the statement of a fact and the statement of a conclusion may be taken from one of the practices of children.

A little girl runs bawling home to her mother.

"Mother," she sobs, "Mary called me a dumbbell."

"Never mind, darling," replies the mother, "Mamma knows better than Mary. Mamma knows you are not a dumbbell."

You see, the little girl was hurt because she did not understand the difference between facts and conclusions. Her playmate had merely been calling names.

Bearing in mind this tendency to accept mere statements of conclusions as statements of fact, the reader will have to be steadily on his guard in going over Mr. Pinchot's pamphlet. The skilled reader will detect the difference, but the careless reader may be misled. It was undoubtedly not Mr. Pinchot's purpose to mislead him. It is quite likely that Mr. Pinchot himself may not have given careful consideration to this distinction.

To show what is meant, a collection of Mr. Pinchot's conclusions have been taken bodily from his text, or adapted from it, for alphabetical arrangement. He says the men responsible for what he calls the power monopoly are:

Abusers (of unregulated, unrestrained privilege).
Blacklisters.
Browbeaters.
Bullyers.
Corrupters.
Enslavers.
Exploiters (of the public, and of finance).
Extortioners.
Inflaters.
Lobbyists.
Masters.
Mighty-men (meaning mighty bad men).
Monopolists.
Padders.
Plotters.
Poisoners (of the fountains of public information).
Profiteers.
Propagandists.
Prostituters.
Seekers (in the dark or by foul means).
Smotherers.

He reinforces these statements with such adjectives as:

Arrogant.
Dominant.
Extra-legal.
Foul.
Merciless.
Ruthless.
Unscrupulous.

It will be seen that these epithets employed by Mr. Pinchot are mere conclusions; not statements of facts. Mr. Pinchot is here doing just what little Mary did to her playmate, that is to say, calling names.

One must not be thrown off his guard by the fact that Mr. Pinchot attempts to qualify as an expert by saying that as a private citizen, as a Federal official, and as governor of a state, he has given much time and some money to a conscientious study of the electric question; and by the fact that he fortifies this by saying:

"For years I have been in almost constant communication and consultation with many serious students of electric power, who have been spurred on in their investigations by deep-seated public spirited apprehension

over the vision of our country entering the great electric era of world competition under the handicap of excessive cost of electricity, the one modern driving power turning the wheels of our domestic, commercial and industrial life."

Even accepting Mr. Pinchot, without reservation, as an expert, it must still be borne in mind that even an expert's opinion is of little value unless the facts upon which it is based are stated. So, then, with this warning as to the difference between conclusions, or opinions, and facts, let us look into Mr. Pinchot's book.

MOST of this book or pamphlet, is taken up in showing that a power monopoly exists in the electric field, and its make-up. Only a small part of the work is devoted to what he terms the "menace" of the so-called monopoly.

The pamphlet has 256 pages of printed matter, 237 pages of which contain appendices, one of which gives an alphabetical list of 4,362 companies said to be owned or controlled by the electrical power industry; the other purporting to give detailed records of the 41 big power corporations in the industry with their genealogy, their financial statements, officers, directors, and financial statistics.

Of the sixteen remaining pages, at least four are devoted to showing the alleged existence of a power monopoly; and not over ten pages, by the most liberal construction, to its so-called "menace."

The facts which Mr. Pinchot presents are given in support of his conclusion that a power monopoly exists. The Federal Trade Commission after a two-year investigation, came to a different conclusion; but Mr. Pinchot has a perfect right to differ from the Trade Commission on that point, and, so far as he states the facts upon which his own opinion is based, they afford a reasonable basis of comparison with the facts upon which the opinion of the Federal Trade Commission is based. Therefore, a student, by weighing the facts presented by both is able to judge which conclusion—that of Mr. Pinchot, or that of the Federal Trade Commission—is supported by the better reason.

HOWEVER, it would seem that Mr. Pinchot need not have taken up the major portion of his space to prove the existence of a power trust, because he says that a power monopoly is not of itself an evil thing. Here are his own words:

"A monopoly of power is in itself not necessarily harmful. The public utility business requires monopolistic authority. Two telephone companies, two gas companies, two electric companies in one town, usually amount to an economic extravagance, if not a financial impossibility."

The harm and danger of the so-called "power trust," as Mr. Pinchot sees it, is not due to its monopoly or even to its enormous size, but to certain things which he summarizes as follows:

1. The monopoly has been created by financial inflation.
2. The financial inflation of the monopoly has been supported by extortion.
3. This inflation and extortion are made possible and perpetuated by the control of investments secured through the blacklisting of investment

houses which may refuse to sell the monopoly's inflated securities to the public.

4. Having forced its inflated securities on American investors, the monopoly now dodges behind these investors for protection against the arm of the law in much the same fashion that meaner elements of lawlessness, like common highwaymen, frequently have used their victims as shields against the bullets of policemen.

5. The power monopoly, fully conscious of its financial, industrial, and legal powers, as well as its extra-legal powers for evil, is seeking now in the open and in the dark, by fair means and by foul, to seize or continue control over the powers of government or, failing in this, to intimidate lawful authority to do its will.

THIS is Mr. Pinchot's expert opinion. What facts are advanced to support it?

None, that the most careful reader will be able to disclose.

There are conclusions aplenty, but no facts. Mr. Pinchot has done a surprising thing; he has been guilty of "pyramiding." He has pyramided conclusion upon conclusion until he has reached the five major conclusions above set forth. It will be observed, of course, that these five statements are statements of opinions and not of facts. Even as expert opinions they would have to be ruled out in any court of law whose object is to ascertain the truth.

It would be impossible to answer in a brief article the many charges which Mr. Pinchot makes in a series of flourishes. This review is not intended as an answer, but as a helpful analysis of Mr. Pinchot's pamphlet. Only one portion of it, showing some facts and Mr. Pinchot's conclusion from them will be considered; when that is done it will, perhaps, show the danger of a too hasty acceptance of Mr. Pinchot's conclusions.

AT page 11 of his pamphlet he gives a list of life insurance investments in public utility securities as follows:

	1920.		1926.	
Aetna	$250,000		$21,133,500	(bonds)
			280,000	(stocks)
Connecticut General	1,800,500	(bonds)	16,267,500	
Connecticut Mutual	1,525,000		22,812,000	
Fidelity Mutual	1,648,000	(bonds)	6,827,150	(bonds)
	61,350	(stock)	165,100	(stock)
John Hancock Mutual	650,000		26,046,000	
Massachusetts Mutual			24,249,450	
Mutual Benefit	718,000		21,103,000	
New England Mutual	6,885,000	(bonds)	35,912,200	(bonds)
	304,900	(stock)	636,000	(stock)
Prudential	24,556,500		157,268,500	
Equitable Life	1,436,000	(bonds)	88,810,000	(bonds)
			2,622,000	(stock)
Metropolitan Life	26,299,000	(bonds)	156,400,650	(bonds)
	49,000	(stock)	470,000	(stock)
New York Life	6,653,000	(bonds)	105,470,000	(bonds)
			187,500	(stock)
TOTALS	$72,835,750		$686,660,550	

This is manifestly a statement of facts. Its purpose is to show an enormous increase of investment by insurance companies in public utility securities. Let us add another illustration not taken from Mr. Pinchot's book, for good measure.

In an address on "Synchronizing Life Insurance Investments with Changing National Needs," in 1927, James Lee Loomis, President, the Connecticut Mutual Life Insurance Company, Hartford, Connecticut, said:

> "While the investment in the public utility field is the least of the four groups under discussion (city mortgages, public utility bonds and stocks, farm mortgages, and railroad bonds and stocks), the increase during the present year has exceeded $200,000,000, and is greater than the increase in either the farm mortgage or the railroad group. Securities in this class at the close of 1921, $224,000,000, represented 3.0 per cent of the admitted assets. A year ago, they represented 6.9 per cent and now, about 7.7 per cent. The life insurance investment in this field is still relatively a small factor. Our holdings of $810,000,000 in bonds as of December 31, 1926, are but 7.4 per cent of the total funded debt of the public utility companies then outstanding, as compiled by Moody. It is interesting to note where some of these securities are located. June 30, 1926, all banks reporting to the Comptroller of the Currency held $1,123,000,000 of public utility bonds. Our holding of these bonds, with a very small amount of stock, will, at the close of 1927, be about $1,019,000,000.
>
> "During the five years preceding June 30, 1926, all banks reporting as above, increased their investment in this type of security by $418,000,000, while the life insurance companies increased their investment in public utility securities for calendar years 1921 to 1926, inclusive, including a very small amount of stock, $590,000,000.
>
> "It should be noted that the investment of the savings banks in these securities has been limited or prevented by statutory restrictions.
>
> "Fire and other forms of insurance companies, other than life, reporting to the Connecticut Insurance Department as of December 31, 1926, held $192,000,000 of public utility bonds, having almost doubled their investment in this group since December 31, 1924."

TURNING to Mr. Pinchot's first major conclusion: "The monopoly has been created by financial inflation," it is fair to assume that he wishes the public to believe that public utility securities are of doubtful investment value.

Now, the fact that insurance companies who are trustees for their policy-holders are investing extensively in the securities of utility companies would tend to inspire the average man with confidence in that class of securities. Insurance men who have large amounts of money to invest—their business requiring investment for its support—would naturally be regarded as experts in the matter of investment. Common attention to their own interests, to say nothing of that of their policyholders, would supposedly require the best exercise of their business judgment, in making investments. The ordinary impression would, therefore, be, that if such men felt it safe to invest in the bonds or stocks of public utility companies, those securities ought to be pretty safe.

How do the insurance men justify

themselves? Here are exerpts from letters received from seven of them:

"We are looking for investments which combine the greatest degree of safety and yield. The stocks and bonds of utility companies seem at the present time to meet this condition as nearly as any other sort of investment."

"It was most essential that life insurance companies should purchase public utility securities during the period mentioned by Mr. Pinchot. From 1920 to 1926 the assets of the insurance companies increased 73 per cent, the total increase being over $5,000,000,000. It was essential that a portion of this money should be invested in bonds and stocks, to keep their assets in a well invested condition."

"The investment of large sums of money in utility bonds and stocks is justified by additional facts. One is that utility corporations have become sound financial institutions, whose securities have become recognized as being satisfactory investments. The other is that utility securities sell at a better yield than the obligations and stocks of railroad companies."

"We buy substantial amounts of public utility bonds because our experience has been eminently satisfactory."

"We have invested in public utility securities, because we believe in the essential soundness and safety of these elements of security investments on behalf of our policyholders, because the companies are being ably managed with good service to the public from which a fair return is available to the investor; and because supervision has become more generally effective. The investment is altogether from conviction of its desirability on the part of our investment committee."

"While the increase in investments of life insurance companies as a whole in public utility securities since 1920 has been greater than the increases in other classes of investments, it is also true that the expansion in the public utility industry has been relatively greater than in any other field. It is an accepted theory that a Commission supervised monopoly affords an attractive medium of investment."

"One insurance man says in nearly every case our company has purchased only issues of bonds approved by a state regulatory body."

PURCHASES of utility securities in large quantities by insurance companies would seem to be a point against Mr. Pinchot. Why, then, does he mention it in his pamphlet? This is what he says about it:

> "These typical samples of changes in insurance investments indicate that even the high executives of mighty insurance companies give heed when the dormant voices of the power monopolists speak."

This is like the case of a man who believed he was dead. Nobody was able to convince him of his error. One day a physician had a happy idea. He asked the man the following questions:

"Did you ever see a dead man bleed?"

"No," replied the man who thought he was dead.

"Do you believe a dead man can bleed?" continued the physician.

"No," was the answer.

"Now," said the physician with conviction, "I am going to prove to you that you are not dead."

So saying the physician whipped out a scalpel and drew a little blood. "You see," he said, "that you bleed. That proves that you are not dead."

"No," replied the man, "That only proves that a dead man can bleed."

TO most persons the fact that public utility securities are regarded as good investments by insurance companies, whose business it is to know what good investments are, would be considered as strong evi-

dence of the value of these securities for investment. To Mr. Pinchot it is added proof of the domination of a power monopoly.

When the attention of the president of one insurance company was called to Mr. Pinchot's statement, the president said:

> "Money goes where the most attractive bid is made for it. In times past we have given heed to the dominant voices of the farmer. If Mr. Pinchot himself should come to us with excellent security and want a loan, I am sure, if we had the money, we would make it and heed his voice. We used to heed the dominant voices of the railroads more than any other dominant voice and we still heed it on occasions; and we heed the dominant voice of the owner of city real estate.
>
> "On the whole we are rather proud of being able to hear the voices of various classes of people who demand money for development purposes, and not only to hear them but to heed them when they deserve to be heeded."

Well, that will do or the purpose of this article. The reader will have to draw his own conclusions. It is to be hoped that this analysis will help him to do so.

It is a point in Mr. Pinchot's favor that he has long been a student of this subject, and that his motives are unselfish. It is another point in his favor that he has been in almost constant communication with many serious students, actuated by deep-seated public spirited apprehension.

But those who have such qualification may nevertheless not always be right. No one could doubt that when it was said in high quarters that if railroads were introduced into England, the hens would cease to lay eggs, the criticism was made from unselfish motives by seriously minded students or that their apprehension was deep-seated and public spirited.

The trouble was, that their judgment was bad.

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Well Regulated

WHERE's the president of this railroad?" asked the man who called at the general offices.

"He's down in Washington, attendin' th' session o' some kind uv' an investigatin' committee," replied the office boy.

"Where's the general manager?"

"He's appearin' before th' Interstate Commerce Commission."

"Well, where's the general superintendent?"

"He's at th' meeting of th' Legislature, fightin' some bum new law."

"Where is the head of the legal department?"

"He's in court, tryin' a suit."

"Then where is the passenger agent?"

"He's explainin' t' th' commercial travelers why we can't reduce th' fare."

"Where is the general freight agent?"

"He's gone out in th' country t' attend a meeting o' th' grange an' tell th' farmers why we ain't got no freight cars."

"Who's running the blame railroad anyway?"

"Th' legislatures and investigators."

—*Pittsburg Press.*

The Cowboy Commissioner from the Apache State

Meet "as good a long distance rifle shot as ever rode in New Mexico and Arizona," the Chairman of the Arizona Corporation Commission—

HON. WILLIAM L. D. CLAYPOOL

HONORABLE William LeRoi Dulaney Claypool, Chairman of the Arizona Corporation Commission, was elected to the office of Commissioner at the general election in November of 1924; he took office in January, 1925 for the regular term of six years.

Chairman Claypool was born in Bowling Green, Kentucky, July 18, 1872. He was the third son of Dr. William Monroe Claypool and Hetty Barclay Claypool. He received his education in the public schools of Bowling Green and later at Ogden College. He studied law in the office of Judge W. L. Dulaney and while so engaged had the privilege of becoming friends with such men as Senator J. C. S. Blackburn, Senator John G. Carlysle, Senator Proctor Knott, Governor Simon Bolivar Buckner, "the Gray Eagle of Glen Lily," Governor John Young Brown, Senator W. C. T. Breckenridge, Attorney General Watt Hardin and General Wolford of "Wolford's Kingdom."

CHAIRMAN Claypool was a drug clerk for several years until, inspired by the religious zeal of his Aunt Jane, he accompanied her as a missionary to Florida. While there he was attracted by tales of adventures and he entered Cuba, where he filibustered with Garcia. Later he accompanied his parents to the West in 1892 and settled in the Mugollon Region in New Mexico, where for a time he worked for the Colonial Mining Company. At this period he also punched cattle and rode the line, becoming famous throughout the Southwest for being "as good a long distance rifle shot as ever rode in New Mexico and Arizona." He entered Arizona in 1896 and was in the employ of the Phelps Dodge Company at the one-time famous Buffalo Smelter in Globe. He was also engaged in construction work with the Old Dominion Mine and Smelter for fourteen years and on numerous other properties.

He was elected to the state legislature in 1914 and served five terms, one as representative, the other four as senator from Gila county. He is familiarly known to everyone as "Senator" Claypool—a title that has taken precedence over his actual title as Chairman.

He was married October 15, 1915, to Daisy May Bush, daughter of Warner Bush and Elizabeth White Bush of Busti, New York.

Senator Claypool's legislative career was signalized by securing appropriations for the famous scenic and commercial highway known as the Superior-Miami Highway of Arizona, which opened the only practical route between the agricultural sections of Arizona and the great Globe and Miami copper mining district. He was Chairman of the Committee on Public Lands when the State Land Code of Arizona was adopted, and was instrumental in establishing the council of defense during the World War; on this he served during the administration of Governor Thomas E. Campbell. He was also a member of the draft board, appointed by General Crozier.

CHAIRMAN Claypool became the manager of the Inspiration Town site, which was afterwards named Claypool in his honor. He also owned and operated the W. & C. Water Company for eight years; from this experience he gained a knowledge of management and control of public service corporations which has made him a valuable member of the Corporation Commission.

Mr. Claypool has at times in his career been a prospector and served as under sheriff of Gila county, and as major on the staff of Governor Brown. His hobby is the betterment of the public school system and the simplification of laws. He was instrumental in creating many of the university scholarships, also in establishing a kindergarten system in Arizona. He has participated with the other Commissioners in rate cases before the Interstate Commerce Commission and has given particular attention to Blue Sky Laws and to regulation of motor vehicle common carriers.

The Arizona Corporation Commission of which Mr. Claypool is Chairman, is the Railroad Commission, the Public Utility Commission, the Securities Commission, the Commission of Corporations and the Insurance Commission of the state. Under its broad powers, it also controls the motor vehicle common carriers and aero transportation.

Why Commissions Discount Signed "Petitions"

THE South Dakota Commission feels that it is an easy matter to get signatures to petitions for or against public utilities. For the sake of avoiding arguments, many persons appear willing to sign petitions in favor of both parties to a controversy. Either their minds are changed by the varying whims of personal influence or else their actions are simply the result of a friendly desire to hurt no one's feelings. Consequently petitions filed with the Commissions have to be taken with several grains of salt.

The March of Events

Arizona

Farmers Protest Power Rates

A CONTROVERSY has arisen in the farm and irrigation areas served by the Tuscon Gas, Electric Light & Power Company over an announcement of an increase in power rates from 2.2 or 2.8 cents per kilowatt hour to 4 cents unless the minimum amount of service, which was raised from a 5-horse power engine to a 10-horse power engine, is used. At a mass meeting of farmers held on March 1st their protest was voiced.

Commissioner Betts, it is reported in the Tuscon *Citizen*, has said that the change had not been authorized. The company, on the other hand, contends that this is not a change in rates but merely a change in the interpretation of the rates already in effect. It has been asserted, moreover, that two members of the Commission had authorized some change.

The Commission decided to hold a hearing on the question on April 8th. Data on the cost of supplying power to various districts in the vicinity of Tuscon is being compiled by the company for presentation at this hearing. In the meantime it is stated that a number of farmers are withholding payment of their bills. Attorneys have been retained by the users.

California

Expansion of Phone Hearing Sought

ANOTHER effort has been developing during the past month to add the American Telephone & Telegraph Company and the Western Electric Company as parties to the investigation of the proposed increase in rates of the Pacific Telephone & Telegraph Company. The Commission earlier in the proceedings dismissed a motion for that purpose, but attorneys for the Telephone Users' Association maintain that the Commission has authority to add these parties, and if they refuse to come in, to dismiss the case.

This association, according to press reports, intends to take an active part in the rate proceeding, not by way of duplicating the efforts of the city attorneys, but to "take up where the city leaves off and present for consideration new matters or matters that may be overlooked by the municipality in its presentation."

Phone Subscribers Interested in Hand-Set Instruments

IN connection with the application of the Southwestern Home Telephone Company for the fixing of rates by the Commission, it is stated in the Los Angeles *Times* that subscribers in Redland are interested in having a rate fixed for the hand-set type of telephone, the kind where the receiver and transmitter are all in one piece. These instruments are said to be more expensive than the other type and the Commission has not up to the present time fixed a schedule of rates for them.

Irrigation Rates to Be Probed

A REQUEST by the San Joaquin and Kings River Canal & Irrigation Company for higher rates and an investigation by the Commission into the affairs of the company received the attention of the Commission on March 2d at Los Banos. Hearings were then adjourned until May 28th in order to give all of the parties an opportunity to study the situation.

The company claims that in the seven years from 1921 to 1927 inclusive it made a profit of only $70,026, an average of about $10,000 profit per year, which is declared to be insufficient as a return upon the investment. It was brought out at the first hearing that the company's canals total more than 200 miles in length and that the most distant consumers are 71 miles from the Mendota dam, where the water is diverted from the San Joaquin river. It is proposed to increase the gross return from approximately $168,000 per year to approximately $500,000 per year.

The People's Protective Association, an organization of 508 water users owning approximately 35,000 acres of land, is fighting the proposed increase.

Canada

Regulation in British Columbia

VIRTUALLY the entire business of selling electricity in British Columbia, it is reported in the *Wall Street Journal*, will be placed under a governing tribunal to be known as the Water and Power Board, which will take the place of the present Water Board of Investigation, according to legislation drafted by the government.

Colorado

Van Companies Apply for Permits

TWENTY-THREE moving, transfer, and general cartage companies in eleven Colorado cities on March 12th applied to the Commission for permits to operate as common carriers. This is something new in Colorado as in the past such companies have not applied for certificates, but a recent decision of the Commission holds that transfer companies come under Commission jurisdiction as common carriers, in that they often accept goods for hauling on the public highways.

Stock Split-up by Company

THE Cities Service Company directors on March 12th voted to split the company's common stock on a basis of four for one, subject to approval by the stockholders at the annual meeting in April. This company started in Denver through Henry L. Doherty and the old Denver Gas & Electric Company.

The result of the stock split-up would be an increase in the company's shares of common stock from five and one-half millions to twenty-two millions, and it is stated in the Denver *Post* that this would put the company second only to General Motors and the Standard Oil Company of New Jersey in the number of common shares outstanding. This action is of much interest to Colorado people as it is estimated unofficially that 200,000 shares of the company's common stock are held in Denver.

Power Line Extensions

THE Western Colorado Power Company, it is stated in the Denver *Post*, is extending its service over Delta county at an expenditure estimated at from $100,000 to $150,000. Recently the company was granted long-term franchises by both Cedaredge and Orchard City. In addition the company has purchased the Hotchkiss Power & Light Company and will extend its lines to that point. This will give power and light to the many homes located on the Rogers mesa.

With the completion of their present program of extension, the *Post* continues, the company will be supplying sixteen cities and towns in western and southwestern Colorado, including the entire mining district in the San Juan triangle.

District of Columbia

Fare Increase Again to the Front

THE officers of the Capital Traction Company, it is announced in the Washington *Post*, on March 14th were authorized by the board of directors to begin any time, within their discretion, a new move to increase street car fares. The effort to secure higher fares has been held in abeyance while the traction merger has been under consideration by Congress.

It is expected, says the *Post*, that the company will await the convening of the extra session of the new Congress before taking any definite action to obtain the increase.

There is considerable speculation as to the appointment of Commissioner Harrison Brand, Jr., whose appointment was not confirmed by the Senate. President Hoover has given no indication publicly of his attitude. Critics of the Commission, it is reported, are opposed to Commissioner Brand's confirmation, while friends of the Commissioner on the other hand say that they are confident that he will be confirmed if he is named to the next Congress, and that he should have a recess appointment in the meantime.

Georgia

Higher Fares Proposed in Augusta

THE Georgia Power Company, which recently purchased the Augusta-Aiken Railway & Electric Corporation, has petitioned the city council of Augusta for an increase in fares to provide an extensive rehabilitating program. The retention of the present 10-cent cash fare is contemplated, but the token fare of 7 cents would be increased to 8½ cents, sales being in quantities of three for 25 cents.

The company, says the Atlanta *Journal*, has announced that it will expend approximately $310,000 in improving its present facilities and bringing the service furnished by the street railway in line with other activities of the city.

Company Must Defend Rates

AN order has been issued by the Commission directing the Georgia Power Company to show cause on April 8th why the Commission should not revise its rates for commercial lighting and retail power. The Commission has recently revised residential lighting rates in towns and cities served by the utility.

Illinois

Bus Jolts Out Teeth

A CLAIM by Albert Jorgensen, a building contractor, that his teeth had been shaken out on a bus of the Chicago Motor Coach Company was advanced on March 6th before the Commission as one of the arguments for the substitution of street car feeder busses for busses of the coach company. Mr. Jorgensen uses "store teeth" and he contends that he ought to be able to ride without losing them.

It was developed by the attorney for the bus company that the jolt which shook out the contractor's teeth was caused by a hole on a street which it is said resembles nothing so much as a concrete and asphalt waffle iron on a large scale.

Phone Dispute with Hotels Reported Settled

THE dispute between the Illinois Bell Telephone Company and Chicago hotels over a division of receipts from nickel telephones, says the Chicago *Tribune*, is reported to have been settled. The Drake and Blackstone hotels alone of all the important downtown hotels on March 13th were said to have refused to accept the telephone company's contract. Both the Stevens and LaSalle hotels accepted the new rates two weeks ago and opened their booths.

The new contract, which was submitted to the hotel companies on January 1st, provided for the hotel owners receiving 22½ per cent of receipts, whereas formerly the hotels received as much as 50 per cent.

Indiana

Holding Company Bill Defeated

THE bills before the legislature to give the Commission broader powers over holding companies were defeated on March 7th by a vote of 57 to 33 in the house of representatives. This, it is stated, leaves the Commission without power to investigate the control over utilities by their parent holding companies which operate outside of the Commission jurisdiction under present laws.

There is now pending before the Commission an investigation of the $70,000,000 Insull merger of Central Indiana Power Company properties with the Terre Haute, Indianapolis & Eastern Traction Company properties. The legislature appropriated for this investigation $25,000, which was much less than the amount estimated by the Commission officials as necessary.

Governor Signs City Gas Laws

THE bills to legalize the 1905 contract between the Citizens' Gas Company and the city of Indianapolis and to set up a utilities district to administer the gas property after it is taken over by the city on March 11th received the approval of Governor Harry G. Leslie. Gas company officials and the city administration immediately began conferences to arrange for the details of the transfer of the plant to the city.

Kansas

Appropriation for Rate Probe

A RESOLUTION was introduced by the Senate Public Utilities Committee on March 2nd, carrying an appropriation of $20,000, which would direct the Commission to conduct an investigation and survey of gas, light, and power rates in Kansas. The decline in prices since the World War is said to be the principal factor back of this resolution.

The Commission is called upon to make an equitable readjustment of the entire rate structure in these matters. This resolution is declared to be in line with recommendations in Governor Reed's message to the legislature in which he declared gas, light, and power rates should be investigated at this time.

Kentucky

Lexington Gas Rate Case

THE Central Kentucky Natural Gas Company and the city of Lexington on March 11th joined in battle before the Commission on the question of gas rates at Lexington. The city contends that a 40-cent rate is just and the company insists upon a 60-cent rate.

One of the issues raised involves the gas supply. The company contends that the supply will be exhausted in twenty years, while witnesses for the city assert that the supply is sufficient to last one hundred years. The proceeding on March 13th was postponed until April 8th, at which time witnesses for the Gas Consumers' League will be heard.

J. A. Edge representing this League, says the Louisville *Herald-Post*, has made a bitter attack on the Lexington papers for their alleged lack of interest in securing cheaper gas.

Charter for Lexington Telephone Company

THE Lexington Telephone Company, it is announced, has organized under the laws of Delaware to furnish telephone service without competition to the city of Lexington, and through its subsidiaries to a number of cities and towns in the Lexington vicinity. This service will be furnished through six exchanges and approximately 15,000 stations to a total population in excess of 100,000. The bankers for the company, it has been reported in the Philadelphia *Public Ledger*, are Hoagland, Allum & Company, Incorporated and the William R. Compton Company.

Louisiana

Water Rates Reduced

THE Baton Rouge Water Works Company has indicated that it desires a return of 8 per cent and no more. It has recently announced a reduction in rates and has expressed willingness to refund amounts collected in excess of these rates during recent months.

The company increased its rates approximately 75 per cent last Fall and after a protest by the city commission council the matter was taken to the courts. The city then tried to inaugurate proceedings to build or purchase a municipal water plant.

The company has offered to give any excess return over 8 per cent to the city to do with what it pleases if the new rates produce more than that return. All along the company has expressed its desire to work out a friendly arrangement with the city and save the expense of litigation or the duplication of facilities which would result from the building of a municipal plant.

Maine

Surplus of Power

A SURPLUS of water power beyond the present need actually exists in Maine, it is shown by a recent engineer's fact-finding study of water power in the Pine Tree state.

The report recommends interconnection of main power plants with power systems outside the state. Such interconnection would enable Maine companies to dispose of surplus hydroelectric energy and also to receive and exchange power from other states in times of low water in Maine or in case of emergency.

The technical work was done by George W. Burpee of the engineering firm of Coverdale and Colpitts, New York city, which was engaged by a committee appointed with the approval of the governor and council of the state.

Maryland

Lower Electric Rates Proposed

THE Suburban Electric Power Company on March 13th filed with the Commission a new schedule of rates which it proposed to put into effect immediately if the Commission should give its consent to shortening the usual period of notice.

Chairman Harold E. West of the Commission, it is stated in the newspapers, said that the Commission would withhold action in view of the continuation of the hearings on the application of the Consolidated Gas, Electric Light & Power Company to extend its lines to Chesapeake Beach and the application of the Suburban Company for the extension of its lines into the same territory, and for the further reason that the acceptance of the new rate on less than statutory notice of thirty days would constitute a tacit approval of what is known as the connection charge of the Suburban Company, which, it is stated, Chairman West said the Commission is not now prepared to give.

Would Relieve Car Riders of Park and Paving Taxes

FROM Baltimore comes the news that officials of the United Railways are starting a campaign to eliminate the paving and park taxes, representing approximately $1,250,000 as a burden on car riders. First the legislature would have to pass an enabling act and then the city administration would have to abolish the taxes in order to attain this objective.

Mr. Emmons, president of the company, is reported as saying that the paving cost is a relic of the horse-car days and that the street car riders are supporting the park system for the city while motorists get the principal benefits. Both taxes are declared to be antiquated and unfair to the company and its patrons.

Mayor Broening, says the Baltimore *Sun*, has been opposed to the elimination of these taxes, while city comptroller R. Walter Graham is quoted as saying:

"The elimination of the park tax is a matter that will require careful consideration. One thing is certain, and that is if the United is relieved of the 9 per cent park tax it should reduce the car fare.

"I have been wondering for some time why the people who use the street cars should pay the park tax, while those who own and drive automobiles escape it."

Massachusetts

Phone Messenger Service

THE messenger service rate on local telephone calls, says the Worcester *Gazette*, has been discontinued by the New England Telephone & Telegraph Company. The company has followed the custom of assuming the responsibility of locating a nonsubscriber and bringing the party to a public pay station to answer a local telephone call, for which the person calling paid the messenger charge.

The company, although discontinuing the messenger service rate, it is reported, will continue to locate nonsubscribers by calling the nearest telephone to his address and if the party called is willing to go out for a neighbor or friend, then no charge will be assessed the subscriber placing the call. But in the event that he will not go out for the party wanted unless paid for it, the subscriber calling will stand the charge for the messenger service.

If a subscriber wants to talk with a non-subscriber in the same local territory, the report continues, the operator will furnish the subscriber with the number of the public pay station nearest to the address of the person desired. The subscriber may then put through his call and deal directly with the person answering the call at the public pay station.

The practice of giving messenger service on toll calls, however, is to be continued and the person calling must pay the messenger charge and the toll charge will be on a person-to-person rate.

Missouri

Dissatisfied with Rate Reduction

A RECENT reduction of 12.2 per cent in rates of the St. Louis County Water Company for metered service, says the St. Louis *Post-Dispatch*, is not considered an adequate reduction by the officials of University City. City attorney Grand on March 12th filed with the Commission a motion for rehearing of the case.

Attorneys for the company had previously filed a motion for a rehearing on the ground that the Commission erred in reducing the rates and that it should have fixed the valuation at approximately $7,000,000 instead of about $5,500,000.

Rider Refuses Higher Fare

PATRONS of public utility companies who refuse to pay increased rates will derive little comfort from a recent case decided in St. Louis. A jury denied Charles H. Fesenfeldt, president of an association of street car riders opposed to an 8-cent fare, his claim for damages for causing his arrest when he refused to pay the higher fare.

Mr. Fesenfeldt on February 7, 1927, deposited 7 cents in the coin box of a street car as his fare, but the conductor refused to let him off the car unless he paid the additional cent. This was refused and the conductor had him arrested on a peace disturbance charge. He was later discharged in court and filed his suit for $8000 damages, alleging false arrest.

The car patron claimed that 7 cents was the legal fare ordered by the Commission and that the company had no right to charge more at the time of his arrest. The street car company was operating under an injunction issued by a Federal Court, restraining the Commission from enforcing its order.

Nebraska

Plant Sold for $1

ANNOUNCEMENT has been made that Atlanta has sold its municipally owned electric plant to the Nebraska Electric Power Company for the sum of $1. In addition, however, the utility company has agreed to furnish 24-hour service instead of the 12-hour per day service formerly provided by the municipal plant. Light bills will be reduced.

New Jersey

Sues Towns for Water Bills

THE New Jersey Suburban and Passaic Consolidated Water Companies on March 7th, according to the Jersey City *Journal*, started a proceeding to collect from the municipalities of Kearny, Harrison, and East Newark, $16.50 on every million gallons of water that has been furnished these towns since the inception of a legal fight over water rates. A petition for that purpose has been presented to Vice-Chancellor Church by McCarter and English, who are the attorneys representing the water companies.

The towns about a year ago filed a bill in chancery to prevent the utilities from shutting off the water supply pending an adjustment of rates. An injunction was granted forbidding the companies to turn off the water and directing the municipalities to pay a rate of $82.50 pending the fixing of a permanent rate by the Commission. The Commission on December 27th, last year, fixed a rate of $99 for each million gallons of water supplied, and the difference, the company asserts, must now be paid.

Hackensack Water Rates

THE Hackensack Water Company on March 14th declared its intention to put into effect on April 1st increased rates which it has been striving for before the Commission. In a letter to the communities affected, Nicholas S. Hill, Jr., president of the company, stated that on May 18, 1928, the company had filed a schedule of rates providing for an increase of 20 per cent, but that this increase was not sufficient to yield a fair return on the fair value of used and useful property.

For various reasons hearings upon the petition had been delayed, and as the Commission suspended the proposed rates, the company found itself without relief after the lapse of nearly one year. Mr. Hill declared that the hearings had been long drawn out and that the company was unable financially to postpone the receipt of additional revenues.

New York

Telephone Rate Increase

THE city of New York, State and Commission attorneys, it is thought likely, will if necessary carry to the United States Supreme Court the New York Telephone Company's rate case, which was on March 11th decided by Special Master Oeland in favor of the company, after litigation to determine whether rates established by the Commission were confiscatory.

The Special Master sustained the company's claim that the rates fixed were insufficient to yield an adequate return and, therefore, invalid. Judge Oeland was appointed by the Federal District Court, for the Southern District of New York, and began to take testimony on October 14, 1924. He held hearings from that date until September 10, 1928. The record includes 36,500 pages of testimony and 3,200 exhibits. Over 600 witnesses were called. Examinations were conducted by representatives of the Commission, the attorney general of the state, the city of New York, and the telephone company.

The next step in the proceedings is the consideration of the report and the hearing of arguments before a special statutory court of three Federal judges. Meanwhile telephone subscribers will enjoy the present rates.

J. S. McCulloh, president of the New York Telephone Company, has stated that should the report be confirmed without modification, some readjustment of the present rates will result. The extent of the readjustment and the particular rates that may be affected cannot now be determined. Mr. McCulloh said, however, that in order to avoid any undue apprehension among subscribers he might state that it is the company's policy to furnish the best possible telephone service at the lowest cost consistent with financial safety. He continued:

"In the best interests of our customers and ourselves rates for telephone service should be low enough to permit the full use of the service, but sufficient to provide a reasonable margin above the cost of furnishing such service. Whatever may be the outcome of this rate litigation, it will be our policy to fix rates on this basis."

Commissioner George R. Lunn, in a statement on March 13th, declared that an increase in telephone rates provided by the decision of the Special Master would net a return of 15 per cent on the common stock. This decision, Mr. Lunn is quoted as saying, will permit an increase over 1928 rates of approximately $15,360,000, which, added to the 1928 net income of $27,554,020, will give the company an annual net income of $42,914,020, or a 15-per cent return on the company's common stock of $280,600,000.

The Special Master's report, in upsetting the Commission decision, permits an increase in rates to allow the company an 8 per cent return on its properties.

Governor's Water-Power Policy

ONE of the outstanding public utility matters brought to the attention of the citizens of New York state during the past month was the water power plan submitted by Governor Roosevelt to the legislature on March 12th in a special message. This dealt only with power development on the St. Lawrence river.

The plan embraces the construction of a dam and hydroelectric plant and its operation and permanent possession by the state; transmission of current to consumers over privately owned distribution systems, unless no satisfactory arrangement can be made with private enterprise, in which case the state as a last resort would enter the distribution field; the creation of a board of five trustees to be appointed by the Governor with the consent of the senate to investigate the whole situation, to prepare a definite plan which would be presented to the legislature, and to carry out this plan after legislative action; the fixing of rates to consumers by means of a contract with a distributing agency, or agencies, made by the board of trustees; and the exemption of the proposed system from the jurisdiction of the Public Service Commission.

Gas Association Meeting

THE annual convention of the gas section of the Empire State Gas & Electric Association will be held at Niagara Falls April 25th and 26th. Gas company executives, engineers, and others representing about 90 per cent of the manufactured gas industry of the state are expected to be in attendance.

Among those who will address the convention are: W. J. Welsh, president of the New York & Richmond Gas Company, and vice-president of the association, and L. T. White, of H. L. Doherty Company.

Technical reports on gas meters, gas distribution, shop practice and other subjects will be discussed and a banquet will be held on April 25th at the Niagara Hotel.

Ohio

Bonds to Guarantee Refund

THE Commission, it is announced in the Toledo *News-Bee*, has taken steps to require the telephone corporations to file additional bonds guaranteeing refunds on the increased rates, should these rates eventually be disallowed by the Commission.

The Ohio Bell Telephone Company, it is estimated, has collected approximately $10,000,000 in various cities where it has been charging for several years increased rates which have not yet been approved by the Commission. This action is said to be the result of directions by Governor Myers Y. Cooper.

Pennsylvania

Bill to Restrict One-Man Cars

THE Howe bill which has been before the Pennsylvania legislature would prohibit one-man cars on streets where the grade is more than 2 per cent. It is stated in the Pittsburgh *Press* that the one-man car controversy grew out of the operation of this type of cars on Evans avenue in McKeesport, where the grade is 9 per cent.

The city, it is reported, charged the one-man cars presented a danger and ordered them off, while the company retaliated by withholding all service, and a compromise was reached, the one-man cars being operated pending a decision by the Commission.

Rate Propaganda

WHILE waiting for further proceedings before the Commission on the proposal of increased rates for the Scranton-Spring Brook Water Company the communities affected, according to newspaper reports, are being flooded with propaganda. Leaders in opposition to the higher rates charged propaganda on the part of the company in its distribution of large numbers of leaflets explaining its side of the rate question.

Counter-propaganda is being spread by the opponents of the company by holding mass meetings and frantically calling upon the consumers to disregard the explanations offered by the water company.

The company, in one of its pamphlets, states that water service bills for the current quarterly period, recently rendered in accordance with the decree of the Commission, have been made the subject of gross misrepresentation, and that ill-advised persons have told water users that they are within their rights in refusing to pay these bills. The company states further that the consumers have been bewildered to such an extent that they do not know the true situation.

Interference with Radio

JUDGE John E. Fox on March 15th dismissed an injunction plea brought by six property owners in the city of Harrisburg against the Pennsylvania Power & Light Company, holding that county courts have no authority to order the removal of high tension electric lines alleged to be interfering with radio reception. He said that such action would be a trespass on the authority of the Public Service Commission.

Utility Expansion Proposed

AUTHORITY has been sought by several utility companies to extend their holdings, it is reported in the Philadelphia *Inquirer*. The Penn Central Light & Power Company of Altoona on March 15th, it is stated, applied to the Commission for approval of the purchase of fifteen public utilities in Bedford, Cambria, Mifflin, Cumber-

land, and Franklin counties, Pennsylvania.

The Keystone Public Service Company filed an application with the Commission for the purchase of the Utica Light, Heat & Power Company and the Polk Light, Heat & Power Company, serving in Venango county.

Permission was requested by the Kennett Gas Company to buy the East Marlboro Township Gas Company, which operate in Chester county.

Mayor Opposes Gas Charge

A 50-cent consumers' charge imposed the last two months by the Fayette County Gas Company has been met with the opposition of Mayor Luther S. Crawford of Uniontown, it is stated in the Pittsburgh *Press*. The mayor sent out notices for a special meeting of the city council to discuss what he terms a "rank imposition."

It is expected that the members of the council, with city solicitor Joseph W. Ray, will discuss the matter of the service charge from every angle and prepare a mode of procedure against the company. Those consumers, it is said, who use small quantities of gas have been paying more each month under the service charge schedule while those using larger amounts have received a slight reduction.

Virginia

Goshen Dam Hearing

THE Commission has fixed April 5th as the date for resuming its hearing on the petition of the Virginia Public Service Company for a license to construct a dam and power plant in Goshen Pass, Rockbridge county. Opposition to the project is being led by garden clubs on the ground that the development would mar the beauty of the pass. The company denies that the scenery would be destroyed.

The hearing began before the Commission on February 28th and so far has been marked by legal skirmishes over technical evidence. When the hearing is resumed the Commission is expected to take testimony and hear arguments as to whether it has jurisdiction in the matter, a question which was injected into the hearing on March 8th when adjournment was taken.

Since this is the first petition filed under the state's Water Power Act, the hearing has attracted widespread interest.

Gas Ordinance Vetoed

THE ordinance passed by the Richmond council to reduce gas rates to large consumers was vetoed on March 19th by Mayor J. Fulmer Bright. The matter will come up again at the April meeting of the council and, according to the Richmond *Times-Dispatch*, unless advocates of the measure are very active, it is believed that the mayor's veto will be sustained.

Another ordinance before the committee on utilities provides a flat rate on gas of $1 per thousand cubic feet instead of the present rate of $1.30. Councilman W. E. Sullivan, it is reported, argues that such a reduction would satisfy large consumers and at the same time give relief to the thousands of small users of the city's gas.

Objection is made by some that the gas plant should not be a profit-making institution for the city.

West Virginia

New Electric Tariff

A NEW schedule of electric rates designed to make the use of electricity more popular for greater consumption has been approved by the Commission at the request of the Monongahela-West Penn Public Service Company. The new rate is said to be optional for approximately 30,000 domestic and commercial consumers in the district served by the company.

Because of the acquisition of new properties from time to time, it is reported, the company has had more or less of an unequal rate in some sections and the new rate is for the purpose of making this more or less uniform. The new rates will become effective when the April bills are sent out and this will give consumers an opportunity to investigate and make a choice of the new rate or the present demand rate which is in use.

Public Utilities Reports

COMPRISING THE DECISIONS, ORDERS AND RECOMMENDATIONS OF COURTS AND COMMISSIONS

VOLUME 1929B NUMBER 2

Points of Special Interest

THE decisions, orders and recommendations of Courts and Commissions, as printed on the pages following, conform to the standard size, proportions and typographical arrangement observed in law reports generally. The pages are numbered, for the purpose of citation, as they will later appear in the bound volumes

PUBLIC UTILITIES REPORTS, ANNOTATED

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INDIANA PUBLIC SERVICE COMMISSION.

GRANT A. KARNS et al.

v.

INDIANAPOLIS STREET RAILWAY COMPANY.

[No. 9500.]

Service — Street railways — Selective stop plan.

A plan proposed by users of a certain car line and other citizens for the purpose of speeding up its service by dividing all cars into three groups, and painting each group with a particular emblem to be designated in rotation on stops along the route to be made by cars of the respective group, was disapproved as more likely to result in confusion, and the company was ordered to submit an ordinary skip-stop plan for remedying the alleged defect in service.

[December 8, 1928.]

PETITION of citizens and other users of street railway service to change the plan of operation on a particular route; denied.

Appearances: Harvey B. Hartsock, Attorney, for the petitioners; D. E. Watson, Attorney, for respondent.

Ellis, Commissioner: On August 25, 1928, Grant A. Karns et al., filed with the Public Service Commission of Indiana a petition suggesting a new plan for operation of street cars on East Washington street line of the Indianapolis Street Railway Company. Said petition, including caption, but omitting signatures, is as follows:

"To Indianapolis Board of Public Works,
To the Indianapolis Street Railway Co.,
To Whom It May Concern:—

"We, the undersigned citizens of Indianapolis, and users of the East Washington street car line, for the purpose of reducing the number of stops and the time required by each car in making the trip, do hereby respectively petition for the adoption of the hereinafter described plan of operating street cars running on the said East Washington street car line, to-wit:—

"1. That this line begin at the downtown business district, running thence eastwardly on Washington street to the end of the line, thence returning to the business district, not continuing

west on Washington street as heretofore, and that during rush hours the cars be operated on a selective stop plan as follows:

"2. Let all cars that run eastward on Washington street be apportioned as nearly as possible into three equal groups; each car in any group to be marked with a separate emblem on its front and sides; say, for group one, a red diamond; for group two, a green oblong; and the third, a black circle.

"3. Let each stop on East Washington street east of the Monon Railroad viaduct be marked with one of the aforesaid emblems; the first one to be marked with the red diamond; the second one, with the green oblong and the third one, with the black circle; the same order of marking to be repeated until the end of the line is reached.

"4. Let the cars run in rotation, viz.: a red diamond car followed by a green obling, followed by a black circle, followed by a red diamond, etc., and as each car moves eastward, let it stop only at the stops marked with its respective emblem; all cars to stop for traffic regulations and signals.

How the Plan Works

"We understand that the above described plan will mean that in order for any one to get off at a stop marked by any certain one of the above mentioned emblems, he must board a car marked with that emblem; but that he may board a car bearing either of the other two emblems and get off one stop either west or east of his own stop.

"We believe the acceleration of the service by the institution of this service will more than make up for any incidental disadvantages.

"We suggest, for the convenience of strangers, that at each stop and in each car there be placed a map of the line showing the allocation of the emblems to the respective street crossing.

"We suggest that this plan be in effect from 6 o'clock until 9 o'clock A. M., on inbound cars, and from 4 o'clock until 7 o'clock P. M. on outbound cars."

The petition was signed by several hundred persons. It will be noted that the petition is addressed to the Indianapolis Board of Public Works and the matter was first presented to that body.
P.U.R.1929B.

Later the petitioners being of the opinion that the Public Service Commission has jurisdiction of the subject matter, the petition was filed with this Commission.

Pursuant to notice to interested parties and legal publication, a hearing was held on said petition on October 4, 1928 at the rooms of the Commission. A number of the petitioners were present at the hearing.

The evidence showed a desire and a need on the part of the patrons of the East Washington street line for a speeding up of the service. The evidence, however, gave little, if any, support to the plan proposed in the petition, it being stated by counsel for the petitioners that the plan was submitted to the Commission for its consideration with no evidence as to its feasibility. The petition, which is set out fully above, suggests a selective stop plan. It is the opinion of the Commission after investigation that this particular plan is not practical for operation on the East Washington street line and it is the view of the Commission that its adoption would result in confusion rather than in speeding up of the service. The Commission will, therefore, deny the petition for the adoption of the selective stop plan outlined above. It is the opinion of the Commission, however, that some steps should be taken to speed up the service on the East Washington street line so as to reduce the running time from the eastern terminus of the line to the down town district. The Indianapolis Street Railway Company, therefore, will be directed to prepare and submit to this Commission for its consideration, a skip-stop plan for operation on the East Washington street line, and such other proposals as the company may have to offer for the speeding up of this service. Upon the submission of the proposed plan of operation any interested parties will be given opportunity to be heard, after which, in the event the proposals are approved as submitted, or with such modifications as may be deemed necessary, it is the opinion of the Commission that such plan should be placed in operation for a trial period. At the conclusion of such trial period, with the data then available, the plan may be made permanent or abandoned, as the facts may warrant.

Singleton, McCardle, concur.

P.U.R.1929B.

ILLINOIS COMMERCE COMMISSION.

MADISON MAGINN

v.

CHICAGO RAPID TRANSIT COMPANY.

[No. 14125.]

Service — Street railways — Commission jurisdiction — Noisy wheels.

1. The Commission has no jurisdiction to direct a traction company to install patent car wheels of such a nature as to reduce noises caused by regular operation, p. 164.

Commissions — Jurisdiction over managerial questions.

2. The State Commission does not have the power to act upon those things which appear to be entirely within the discretion of the managing officers or the Boards of Directors of the respective public utilities, p. 164.

[December 13, 1928.]

COMPLAINT by citizen against noisy operation of a traction company; complaint dismissed.

By the **Commission:**

[1, 2] On May 10, 1924, a complaint was filed before the Illinois Commerce Commission by one Madison Maginn, charging the Chicago Rapid Transit Company with creating excessive and unnecessary noises to the great inconvenience of the general public and tending to injure the health and interfere with the comfort of all persons residing in, or engaged in business in, the vicinity of the right of way of the respondent, and other persons who are compelled to pass or to be in such vicinity or to use the cars or trains of respondent for means of transportation.

Pursuant to notice, as required by law and by the rules of the Illinois Commerce Commission, hearings were held upon such complaint before the Commission sitting en banc and before assistant Commissioners delegated and authorized by the Commission to hear such testimony.

At such hearings so held Mr. Morton T. Culver appeared for and on behalf of the complainant and Mr. C. H. Jones appeared for and on behalf of the respondent. At the hearings so held it developed from the testimony that the complainant, in connection with the complaint concerning excessive and unnecessary noises

caused by the operation of the cars of the Chicago Rapid Transit Company, offered a solution or remedy for the same by suggesting the use of a car wheel with rubber insulation, the same being a patent product of the complainant.

At each of such hearings the respondent questioned and objected to the jurisdiction of the Illinois Commerce Commission in said cause and argued that the Commission was wholly without power, authority or jurisdiction to order or direct the said respondent, Chicago Rapid Transit Company, to equip its cars with the type and style of car wheel offered by the complainant for the elimination of all excessive and unnecessary noises complained of.

The Commission having heard all of the testimony offered, both oral and documentary, and having heard the statements of counsel and being fully advised in the premises upon consideration thereof finds:

That the relief herein sought to be obtained by ordering the respondent, Chicago Rapid Transit Company, to reduce the noises caused by its car wheels by the use of a patent car wheel, which alone would meet some standard which might be fixed by order of the Commission, would be discriminatory and, therefore, beyond the jurisdiction of the Commission.

In the case of State P. U. C. ex rel. Springfield v. Springfield Gas & E. Co. 291 Ill. 209, P.U.R.1920C, 640, 663, 125 N. E. 891, the court said in part as follows:

"It must, however, be kept in mind, in considering questions of business policy, that the Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation."

It further appears to the Commission that the general trend of the decisions of the courts has been that the regulatory bodies of the respective states do not have the power to act upon those things which appear to be entirely within the discretion of the managing officers or the Boards of Directors of the respective public utilities and that the Commissions are acting beyond their jurisdiction, if an effort is made to substitute themselves for such Boards of Directors.

The Commission further finds that the relief herein sought to

be obtained and the order herein prayed for would be wholly beyond the jurisdiction of the Commission.

It is therefore *ordered* by the Commission that the complaint filed by one Madison Maginn in the above entitled cause, charging the Chicago Rapid Transit Company with creating excessive and unnecessary noises to the great inconvenience of the general public, be, and the same is hereby, dismissed.

MARYLAND COURT OF APPEALS.

WILLIAM H. SURRATT

v.

CHESAPEAKE & POTOMAC TELEPHONE COMPANY.

[No. 96.]

(— Md. —, 144 Atl. 495.)

Injunction — Necessary allegation — Disputed telephone bill.

The allegation in a bill for an injunction that an account rendered by a telephone company is inaccurate and grossly excessive, together with an offer to pay the amount admitted to be due or to adjust the account by payment of such a sum as would reasonably and fairly represent the proper charges for the services rendered, is insufficient to support a bill for an injunction to restrain the company from discontinuing service.

[January 31, 1929.]

APPEAL from circuit court of Baltimore City from a decree refusing an injunction to a telephone patron to restrain a company from discontinuing service; decree of lower court affirmed.

Argued before Bond, C. J., and Pattison, Urner, Adkins, Offutt, Parke, and Sloan, JJ.

Appearances: Paul R. Hassencamp and William H. Surratt, both of Baltimore, for appellant; Charles H. Carter and William L. Marbury, both of Baltimore (Bernard Carter & Sons and Marbury, Gosnell & Williams, all of Baltimore, and Dozier A. Devane, of Washington, D. C., on the brief), for appellee.

Adkins, J.: The single question in this case is whether the allegation in the bill of complaint that an account rendered by a

telephone company "is inaccurate and grossly excessive," together with an offer to pay the amount admitted to be due or to adjust the account "and to pay such sum of money as would reasonably and fairly represent the proper charges for the services rendered by the defendant," is sufficient to support bill for an injunction to restrain defendant from discontinuing telephone service for the refusal of plaintiff to pay the bill.

The plaintiff is a practicing attorney, and the defendant is the Chesapeake & Potomac Telephone Company of Baltimore city.

The chancellor sustained the demurrer to the third amended bill of complaint and dismissed the bill, and the appeal is from that decree. Demurrers to the original bill and the earlier amended bills had previously been sustained.

The bill now under consideration alleges: That for many years plaintiff has been a subscriber to the service furnished by defendant; that for a long time prior to the filing of this bill, there existed between plaintiff and defendant contention as to the accuracy of accounts rendered by defendant, and that the present account is inaccurate and grossly excessive, "the said account as rendered being in the sum of $77.89 (a copy of said account being attached hereto and make a part hereof), $7.45 of which account he admits, being and comprising the following four items: May 1927 $2.10, June 1927 $2.50, July 1927 $1.25, August 1927 $1.60, and the balance of $70.44 he disputes; and which account your orator has refused to pay (though he hereby tenders himself as ready, willing, and able to adjust said account with the defendant and to pay such sum of money as would reasonably and fairly represent the proper charges for the services rendered by the defendant)." That defendant has notified plaintiff that unless the disputed account is paid without deduction telephone service in plaintiff's offices will be discontinued on a date named; that the discontinuance of such service would work an irreparable injury to plaintiff's practice; and that he is without remedy save in a court of equity. The prayer of the bill is for an injunction and for further relief.

With the bill was filed an account rendered by defendant covering a period of eight months, beginning January 1, 1927, a balance of $115.74 having been brought forward from the previ-

ous year. The account contains a statement for each month, and the items for each month are: Telephone service for the month, additional local messages for the previous month, toll service for the previous month, and balance due on bill rendered. In addition, there are credits in four of the months of cash payments. Credits of May 5, 1927, and June 29, 1927, appear to settle the account up to May 1st, except for additional local messages and toll service for April, which are included in the May statement. It is not charged that plaintiff has not been given credit for all payments made by him. It, therefore, appears that included in the amount disputed by plaintiff are the regular monthly service charges for May, June, July, and August, which are the same in each of those months as in the previous months for which settlement appears to have been made. Certainly the court was entitled to be informed why such items as these at least were disputed. Apparently all the "additional local messages" are questioned. But it is not explained whether that is because there were no such messages, or not so many, or because defendant was not entitled to make an extra charge for them or charged too much. And in this connection there is not a word in the bill as to what was the contract between plaintiff and defendant. If the tender in the bill of willingness "to adjust said account with the defendant and to pay such sums of money as would reasonably and fairly represent the proper charges for the service rendered by the defendant" is to be taken as an admission that part of the disputed balance is due, there is a failure to state what part is due, and why the remaining part is not due; or in what respect the account "is inaccurate and grossly excessive" as to the disputed balance. Again, it is not alleged that any effort was ever made by plaintiff to explain to defendant his reasons for disputing the accuracy of the account; or that he ever pointed out to defendant the items which he regarded as erroneous; or asked for a more detailed statement; or that he ever offered to pay any part of the balance claimed to be due.

How could the chancellor know whether there was any just or reasonable ground for disputing the account, from the mere statement by the pleader that the account "is inaccurate and grossly excessive" without the slightest reference to the con-

tract between the parties or the statement of a single fact? It is not greatly different from charging fraud without setting out the facts which constitute the fraud.

It is not necessary to cite authorities for the proposition that in any bill for injunction it is required that the statements of facts which the plaintiff expects to prove shall be full, clear, and frank. As said in Stinson v. Ellicott City & Clarksville Co. 109 Md. 111, 116, 71 Atl. 527: "When a party seeks the aid of a Court, by writ of injunction, his right to it ought not to be left in doubt by the allegations of the bill, and the defendant ought not to be required to guess what the plaintiff does rely on."

That is applicable to every application for injunctive relief. It is especially apt in cases to restrain in the use by a public utility company of the remedy which is essential to its very life and to the satisfactory performance of its obligations to the public. It needs no argument to show that the costs and delays that would be involved in suing on the thousands of small accounts which make up the business of such a company would make it impossible to give the service which the public has the right to demand, except at prohibitive rates. As was said in Carter v. Suburban Water Co. 131 Md. 91, 101 Atl. 771, L.R.A.1918A, 764, (upon which case appellant places his principal reliance), quoting from Poole v. Paris Mountain Water Co. 81 S. C. 438, 447, 62 S. E. 874, 128 Am. St. Rep. 923, the right to discontinue the service for nonpayment of recent and just bills "cannot be exercised so as to coerce the consumer into paying a bill which is unjust or which the consumer in good faith and with show of reason disputes, by denying him such a prime necessity of life as water, when he offers to comply with the reasonable rules of the company as to such supply for the current term." But in the Carter Case, *supra,* the cause of complaint was set out with at least some degree of definiteness, and there was an allegation in the bill that the plaintiff had expressed to defendant his willingness to adjust the accounts and to pay for the services which he admitted had been rendered and the defendant had positively refused even to consider plaintiff's claim. All such allegations are absent from the bill of complaint in the case at bar. And here there is no such "show of reason" for the

dispute as would justify a chancellor in granting the relief prayed.

If we are at liberty to consider the original bill of complaint and the earlier amended bills, demurrers to which were sustained (and this we do not decide, merely calling attention to the fact that Carter v. First National Bank, 128 Md. 581, 98 Atl. 77, cited by appellee, is not conclusive upon this point because there the filing of the amended bill was voluntary and not after a demurrer had been sustained), it would not help plaintiff's case, because in none of them is there a statement of facts upon which plaintiff relies for his assertion. In the first amended bill, it is true, there is an allegation "that the present account as rendered by the defendant to your Orator is inaccurate and grossly excessive (in that it charges your Orator with services which the defendant never rendered to your Orator)." But there is nothing to indicate that the plaintiff had any definite idea as to which of the services charged for were not rendered. And it is significant that the allegation referred to does not appear in the original bill nor in either of the other amended bills. It is stated in appellee's brief, and not contradicted, that in the arguments on the several demurrers attention was called to the absence of allegation of facts, and yet this deficiency was not supplied in subsequent amendments. The impression left by the bills is that plaintiff honestly suspected he had been overcharged, but was unable to point out any of the items erroneously charged. In such a situation, relief cannot be obtained by injunction. A repetition of the difficulty might be avoided by keeping a record of the use of the phone.

Finding no error in the decree, it will be affirmed.

Decree affirmed, with costs to appellee.

P.U.R.1929B.

CONNECTICUT PUBLIC UTILITIES COMMISSION.

ALFRED MEYER et al.

v.

TORRINGTON ELECTRIC LIGHT COMPANY.

[Docket No. 5231.]

Service — Extension — Rural consumers — Electricity.

1. The policy of an electric company in consenting to extend service to rural consumers upon a guarantee of at least 20 per cent gross return on the cost of such extension was held to be reasonable, in view of the higher returns demanded by other companies in similar situations, p. 172.

Service — Extensions — Plan for defraying cost.

2. No fixed plan should be adopted to take care of the cost of extending service to more or less isolated electric consumers, but each case should be decided on its own merits, p. 172.

[January 23, 1929.]

PETITION by rural consumers for extension of electric service; petition suspended pending agreement between parties in accordance with the conditions outlined in the opinion herein.

By the **Commission:** On December 1, 1928, the following petition was filed with the Commission:

Torrington, Conn.
November 23, 1928.
Box 227, R. F. D. # 1.

Mr. Henry F. Billings, Secretary, Public Utilities Commission, Hartford, Conn.

Dear Sir:

We, the undersigned property owners in the Newfield district of the city of Torrington, have agreed to pay for electricity a minimum fee of $2 per month to the Torrington Electric Light Company.

This offer was refused and we were made to understand that $5 per month was the minimum charge for their services. Such charges seem to us unreasonable, and we kindly ask you to help us in this matter.

Respectfully yours,
(Signed) Alfred Meyer, and (14) others.

Said petition was assigned for a hearing at the office of the Commission in Hartford on Friday, December 21, 1928, at 2:30 o'clock in the afternoon. Notice of the pendency of the petition and of the time and place of hearing same was given to the petitioners and to the Torrington Electric Light Company, as fully appears from order of notice and return thereon, on file. At said time and place the petitioners and said company appeared and were fully heard.

It appeared from the evidence that an extension of about 2.4 miles would be required to serve the petitioners: that the first section of the line, covering a distance of about .7 of a mile, would run through a territory where only two of the petitioners reside: that the next section of about .8 of a mile would serve nearly all of the petitioners; and that the remaining section of about .9 of a mile would serve only two of the petitioners.

Petitioners claimed that 21 separate houses or tenements would be served under the proposed extension, although two of the houses were at the time of the hearing in process of foreclosure. Petitioners also claimed that several other connections would result from the extension, but it appeared that such connections represent only the possibility that some of the petitioners would construct new houses after the extension of the proposed service.

An examination of the cost data submitted by the company, which was computed on the basis of constructing a joint pole line with the Southern New England Telephone Company, shows that the estimate of cost is reasonable.

[1, 2] The company was willing to invest the necessary capital to serve these petitioners, provided it could be assured of an annual gross revenue from the extension of approximately $885, said sum representing a 20 per cent gross return on the cost of the extension, estimated at $4427.

Inquiry at the hearing from the petitioners of their probable amount of monthly consumption of current, indicated that only two or three would consume $5 worth of current each month, and that the greater number of them would consume but little if any more than the regular minimum of $1 per month.

The territory that would be served by the extension is not

growing rapidly, and the prospect of future growth, at least in the immediate future, is not favorable and cannot be considered by the Commission as a factor in deciding this case or under what terms the extension should be made.

The Commission recognizes the increasing demand for and benefits of electric service in rural communities, and desires to foster the extension of electric service into rural communities as fully and rapidly as possible. However, the Commission cannot lawfully order the company to extend its service into new territory where the probable return will not reimburse the company for the expenses of operation and afford it at least a small return on the investment necessary to supply such service.

The 20 per cent gross return on the cost of the proposed extension is less than the percentage usually asked by electric companies in extensions into new territory. Probably the company would be justified in seeking a larger percentage, and its willingness in this case to be content with a 20 per cent gross revenue, yielding only a small return on the investment, is commendable.

It appears that an extension of approximately 1.5 miles would serve all but two of the petitioners, and naturally such a limited extension could be constructed at a materially less cost than the requested extension of about 2.4 miles, and would require less annual gross revenue to warrant its construction. It may be found feasible to construct such limited extension upon an arrangement less burdensome for those actually served thereby, than would be possible if the entire proposed extension is included.

The petitioners have made no proposition to the company, other than to take its service at its regular rates.

From the evidence presented at the hearing, the Commission is of opinion and finds that the Torrington Electric Light Company is not at the present time unreasonably refusing to extend its lines to serve the petitioners with electric service at its regular rates.

The Commission has not heretofore prescribed any definite policy or rule in determining the conditions upon which extensions of electric service should be made into undeveloped or rural territory, where it appears that the desired extension can-

not pay the cost of operation at regular rates and afford the company a reasonable return on the investment involved. Each extension has been determined upon its own facts and merits.

Different plans have been adopted in making such extensions, some approved by the Commission, and some by mutual agreement between the company and the prospective patrons, but all involving some additional payment over and above the regular rates. In some cases cash or equivalent contributions have been made toward the cost of constructing the line, the patrons then receiving the service at regular rates; in other cases a guarantee that the company will receive an annual gross revenue of at least a stated amount for a term of years; and in still other cases an increased rate for the customers along the extension, or a combination of increased rate and guarantee whereby the company is assured of at least a stated amount of annual gross revenue for a term of years, etc. Certain companies have adopted rules pertaining to such extensions, some companies establishing a predetermined fixed charge per customer per month for each 100 feet of extension in excess of the ordinary free extension service, irrespective of the total cost of the extension, while other companies have established a predetermined fixed charge per customer per mile, the amount depending upon the number of customers per mile and irrespective of the cost of the extension. It is difficult to adopt any fixed plan which will meet conditions in every case.

Where a number of patrons contribute toward the cost of construction, or guarantee the company a certain annual gross revenue for a term of years, and after the service is installed, other persons along the extension demand and receive service at regular rates, such original patrons justly feel that they are discriminated against. The surest way to guard against such discrimination is to establish a special rate applicable to all takers, both present and future, along such extension, such rate being sufficiently high to provide the annual gross revenue necessary to warrant the extension. Such a plan in certain cases, however, would require so high a rate as to be prohibitive for some and thereby defeat the purpose of the extension.

The combination of an increased rate by way of an increased monthly minimum, and a guarantee of the necessary total gross revenue, would serve in this case to best meet the situation and may possibly serve as a guide in future extensions.

The Commission is of opinion in this case that if the petitioners or any of them are willing to contract with said company for a period of five years, agreeing to pay the company a minimum rate of $3 per month per customer, taking service at regular rates, and all or any of them shall guarantee to the company also that the annual gross revenue to the company on the extension during the five year period shall be not less than 20 per cent of the actual cost of the extension, the Commission would be warranted in ordering the company to extend its lines to serve such patrons as may be involved in the extension agreed upon. Such contract should further provide that upon the termination of the 5-year period, the regular rates then in force, including its regular minimum rate, shall be the regular rates on such extension.

Said petition is not denied, but is held in abeyance until May 1, 1929, at which time, if the Commission shall not have received information from the petitioners of their willingness to execute a contract upon terms stated above or upon other terms reasonably equitable to all parties in interest, the petition will be dismissed.

We hereby determine and direct that notice of the foregoing be given to petitioners and to the respondent company, by Henry F. Billings, Secretary of the Commission, by forwarding by registered mail true and attested copies thereof addressed one to each signer of the petition (R. F. D. # 1, Torrington, Connecticut) and one to the Torrington Electric Light Company, Torrington, Connecticut, on or before the 25th day of January 1929 and due return make hereon.

MONTANA PUBLIC SERVICE COMMISSION.

PUBLIC SERVICE COMMISSION

v.

GREAT NORTHERN UTILITIES COMPANY.

[Docket Nos. 991, 1028, Report & Order No. 1530.]

Return — Operating expenses — Duty of the utility.

1. It is incumbent upon a public utility to produce its service as economically as possible, and it is not free to adopt a less economical method of producing its service and charge to its patrons on the basis of such excessive cost, p. 184.

Valuation — Savings on supply contract — Natural gas.

2. A natural gas company having entered into a contract which reduces the cost of obtaining its product below the cost of producing it with a plant constructed by itself, has not the right to capitalize the difference or any part of it, p. 184.

Return — Amortization — Property rendered obsolete by supply contract.

3. If it should be made to appear that by reason of an advantageous supply contract, a portion of a utility's property previously devoted to public service is rendered obsolete or unnecessary, equity requires that it be permitted to amortize the value of such superseded property, less salvage, over a term of years out of earnings, p. 184.

Return — Operating expense — Reasonableness of supply contract.

4. Reasonableness of the rate which a distributing utility pays for its product under a supply contract will be assumed until it is made the subject of a direct inquiry, p. 189.

Valuation — Overhead allowance — Material and labor.

5. An allowance of 4 per cent as an overhead on all material and labor items was held to be reasonable, in an estimate of reproduction cost new of the gas plant, p. 191.

Valuation — Legal expenses during organization.

6. A specific item for legal expenses incurred in connection with the organization of a gas utility was disallowed in view of the established practice of the Commission in taking care of such items through the overhead allowance, p. 191.

Valuation — Depreciation — Necessity for deducting.

7. The fact that a utility is rendering efficient service does not establish the fact that depreciation in its plant does not exist, p. 194.

Valuation — Working capital — Purpose — Absence of general rule.

8. No hard and fast rule for determining the amount of working capital can be made because each utility represents an individual case, and the working capital requirement is to be measured by the amount of funds necessary to keep operations running smoothly, safely, and economically in each particular case, p. 194.

Return — Operating expenses — Failure to collect account.

9. A delinquency in consumers' account showing an inexcusable indulgence on the part of the utility is not chargeable to the customers in general, where the company has the advantage of regulations designed to insure promptitude in payment and any burden caused by a waiver in their application is to be borne by the utility and not its patrons, p. 194.

Valuation — Working capital — Factors to be considered.

10. The wages of officers and employees and the requirement of credit demands for a particular utility as well as the amount of funds on hand in the depreciation reserve, surplus, and accrued taxes accounts not invested in necessary additions, are factors to be considered in making allowances for cash working capital, p. 194.

Valuation — Material and supplies.

11. A mere inventory of material and supplies on hand at any given period is not conclusive and often not even persuasive of the proper amount to be allowed, p. 197.

Valuation — Cost of financing.

12. No allowance was made for the cost of financing in the valuation of a gas utility property, p. 197.

Valuation — Going value.

13. No specific allowance was made for going concern value in the valuation of a gas plant, p. 197.

Discrimination — Combined utility department — Cost of service.

14. A gas utility doubtless has the right to furnish its own electric department with gas at cost but that cost must truly reflect all items that properly enter into a determination of the cost, otherwise it will be prejudicial to the gas consumers and in favor of the electrical consumers, p. 200.

Return — Operating expenses — Services of affiliated company.

15. A Commission in accepting payment by a local utility to an affiliated utility in compensation for administration services as legitimate operating expenses will require proof of actual service and evidence of the reasonable value thereof, p. 200.

Rates — Commission authority to fix minimum rates — Rate war.

16. The Commission is empowered by law to regulate the rates of public utilities and to fix specific charges and may not only prevent the adoption of a higher rate without its authority, but also has the authority to protect the public against the wasteful consequences of rate wars by fixing minimum rates, p. 201.

Rates — Reasonableness — Factors for consideration.

17. In determining whether or not the Commission shall concur in a proposed advance or reduction in existing schedules, its judgment is to be measured by the provision of law that rates charged by a utility shall be just and reasonable, fair to the consumer, and fair to the utility, p. 201.

Monopoly and competition — Impairment of service — Rate war.

18. A utility for the purpose of driving a competitor from the field will not be permitted to adopt such low rates or waive its right to a fair return to such an extent as to imperil its ability to render dependable service to the public, which is its primary duty, p. 205.

Rates — Reasonableness — Impairment of service.

19. A gas utility attempting to engage in a competitive rate war was not allowed to reduce rates below a point insufficient to provide efficient or normal operating expenses in view of the likelihood of impairing the quality of service, which was said to be as important as reasonable rates, p. 205.

Monopoly and competition — Competition in utility regulation.

Discussion of the wasteful effects of competition in public utility regulation, p. 210.

(YOUNG, Commissioner, dissents.)

[January 22, 1929.]

INVESTIGATION by the Commission on its own motion into the reasonableness of rates for natural gas utility; proposed rates disallowed.

Appearances: A. H. Sikes, Manager, Great Northern Utilities Company, Great Falls; E. R. Foster, Valuation Engineer, Great Northern Utilities Company, Chicago; E. G. Toomey, Attorney for the Great Northern Utilities Company, Helena; J. H. Stevens, Shelby; S. A. Hole, Shelby; Lewis P. Donovan, Attorney, Shelby; Foot, MacDonald & Black, Attorneys, Shelby; Jesse G. Henderson, Attorney, Shelby, for Larson Brothers, W. T. Cavett, and other citizens of Shelby; Harris and Hoyt, Attorneys, Shelby, for the Citizens Gas Company; Francis A. Silver, Counsel, and Fred E. Buck, Chief Engineer, for the Commission.

By the **Commission:** On September 21, 1927, the Commission, upon its own motion, instituted an inquiry into the reasonableness of the rates charged by the Great Northern Utilities Company (hereinafter called Utility), for natural gas service at Shelby, Toole county, Montana. The schedule of rates then in effect commenced with a base rate of 60 cents (net) and through a series of five steps reached the lowest rate charged, to-wit: 30 cents (net) for all consumption over 300,000 cubic feet per month. Prior to the return day upon the order to show cause

why the rates should not be reduced, the Utility filed a new tariff with the Commission stating rates as follows:

	Net
First 10,000 cu. ft. per month per meter	50¢ per M. cu. ft.
Next 10,000 cu. ft. per month per meter	45¢ per M. cu. ft.
Next 30,000 cu. ft. per month per meter	40¢ per M. cu. ft.
Next 250,000 cu. ft. per mnoth per meter	35¢ per M. cu. ft.
Over 300,000 cu. ft. per month per meter	30¢ per M. cu. ft.

Minimum bill: $1.50 per month per meter.
Prompt payment discount: None.

The tariff was approved tentatively by the Commission to await its findings in the instant inquiry. The only reduction between the net rates of the prior schedule and the one tentatively approved is found in the first 10,000 cubic feet consumption. On November 15, 1927, the Utility filed a written return to the order to show cause setting forth a resume of its operating revenues and expenses and alleging, "that the actual investment in the gas utility up to October 1, 1927, exceeds $100,000. That the cost of reproduction new of the property devoted to the gas service is in excess of $125,000 and that the fair present value of the gas property devoted to public service at Shelby demands and requires in order to earn a fair return in accordance with the decisions of the Supreme Court of the United States, increased rates for gas service." The cause was regularly assigned for public hearing and came on to be heard at Shelby on November 29, 1927, at which time the utility submitted evidence concerning its properties and gas operations at Shelby. The figures submitted by the Utility were challenged in many important respects by citizens appearing upon behalf of consumers at Shelby. So great was the disparity in the figures submitted by the Utility and those offered upon behalf of the citizens' committee that the Commission deemed it necessary that a valuation be made by its engineering staff, which was accordingly done. For the purpose of receiving the report of its chief engineer in evidence in the record, a second public hearing was held at Shelby on October 1, 1928, copies of our engineer's valuation having been furnished to the utility and the citizens' committee in advance.

On January 10, 1927, prior to the institution of this investigation, the city of Shelby granted a franchise to the Shelby Oil & Gas Company, a local company, organized by citizens of Shel-

by, authorizing the use of the city's streets and alleys for the laying of gas mains, it being the announced intention of the Shelby Oil & Gas Company to construct a natural gas plant in competition with the utility. This franchise ultimately passed, by assignment, to the Citizens Gas Company, a Montana corporation (controlled by Minneapolis, Minnesota, interests), which, during the fall of 1928, undertook and completed a pipe line leading to Shelby from natural gas wells situated about three miles from Shelby and a distribution system covering the business section of Shelby and a portion of its residential area. The Citizens Gas Company commenced distribution of natural gas at Shelby during the latter part of October and is operating under a tariff, approved by the Commission, stating rates as follows:

		Net
First 10,000 cubic feet per month	35¢	per M. cu. ft.
Next 10,000 cubic feet per month	30¢	per M. cu. ft.
Next 30,000 cubic feet per month	27½¢	per M. cu. ft.
Next 250,000 cubic feet per month	25¢	per M. cu. ft.
All over 300,000 cubic feet per month	22½¢	per M. cu. ft.

Following the commencement of operations by the Citizens Gas Company, the Great Northern Utilities Company filed with the Commission on November 8, 1928, a new tariff providing rates of 25 cents per thousand cubic feet for all consumption up to 300,000 cubic feet per month, and 20 cents per thousand cubic feet for all quantities above 300,000 cubic feet. On November 19, 1928, and before the Commission had taken any action on its tariff of November 8th, the Utility filed another tariff embodying further proposed reductions in its rates, the new schedule calling for 20 cents per thousand cubic feet up to 300,000 cubic feet and 15 cents for all over. These filings were promptly met with a complaint and protest by the Citizens Gas Company on the grounds that the rates were "unfair, unjust, and unreasonable" to the Citizens Gas Company; "will not yield nor return a reasonable profit on its investments and represents unjust and unfair competition." This complaint was assigned a separate docket number (1027) and is now pending upon a motion to dismiss for lack of jurisdiction filed by the Great Northern Utilities Company. On November 30, 1928, the Commission, on its own initial motion, ordered this Utility to appear before

it at Shelby on December 20, 1928, to submit evidence in support of the reasonableness and justness of the rates and charges proposed in its tariff of November 19, 1928, which is designated hereafter as Schedule 4-A. The tariff of November 8, 1928, was cancelled by the filing of Schedule 4-A, sheet 2. In accordance with the Commission's order, the Utility appeared on the date set and through its manager and superintendent produced evidence hereinafter discussed. The Citizens Gas Company also appeared at the hearing as did some twelve consumers, who allege in their appearance filing that the tariff now proposed by the Utility is not proposed in good faith; that the rates therein stated are not remunerative and that they are proposed only for the purpose of driving the Citizens Gas Company out of business.

The issues involved in these two proceedings commenced by the Commission Dockets 991 and 1028—are so interrelated that we have determined to consolidate them for decision. We proceed first to a determination of the fair value of the utility's property, used and useful, for the convenience of the public.

The Utility submits the claim that the total value of its property and business, used and useful, devoted to natural gas service at Shelby, as of August 31, 1928, is $213,208.91. The segregated items composing its claimed rate base are set forth by the Utility's engineer in his Exhibit 8, Docket No. 991, hearing of October 1, 1928. They are as follows:

Minimum value of contract	$75,000.00
Original purchase:	
(a) Land and building (gas department)	3,000.00
(b) Clearing way for gas utility	2,000.00
Improvements on land and building (60% to gas department)	2,621.11
Plan and construction engineering	15,000.00
Plan and construction superintendence	10,000.00
Legal expense (no statutory fees included)	1,500.00
Investment in physical property except as above at end of period based on Commission finding at Sept. 30, 1923 ($31,403.10) plus construction expenditures from the company records	58,759.02
Fair allowance for working capital	13,500.00
Cost of financing	8,028.78
Fair allowance for going value	23,800.00
Total property and business	$213,208.91

Buck, chief engineer for the Commission, made a valuation of the physical property of the utility upon the basis of reproduc-

tion cost new less depreciation at prices prevailing as of January 1, 1928. He arrives at the figure $43,440,86 as the cost of reproducing the Utility's plant new and computes depreciation, based upon inspection, at $7,173.80, thus placing its present value (as of January 1, 1928) for rate-making purposes at $36,267.06. Intangibles are not included and land is valued at market value. The following table summarizes his findings:

Item	Reproduction cost	Per cent condition	Present value
Land	$1,300.00		$1,300.00
Buildings:			
(a) Office and warehouse	2,481.71	90	2,233.54
(b) Regulator house	1,186.11	95	1,126.81
Distribution:			
(a) Mains	16,914.36	80	13,531.49
(b) Services	4,761.55	65	3,095.01
Meters and regulators	14,559.15	90	13,103.24
Shop tools	395.24	50	197.62
Office equipment	600.61	95	570.58
Miscellaneous:			
(a) Car	285.00	70	199.50
(b) Telephone	957.13	95	909.27
Total	$43,440.86		$36,267.06
Equated per cent condition			83.48%

All of the above costs, excepting land, include an allowance of 14 per cent to cover construction overheads, as follows: Engineering and superintendence, 4 per cent; Interest during construction, 4 per cent; Insurance, 1 per cent; Omission and contingencies, 2 per cent; and Organization, 3 per cent.

The market value of the land upon which the Utility's office is situated and which is used jointly by the gas and electric departments, is apportioned by Buck on the basis of 55 per cent to the gas department and 45 per cent to the electric. The reproduction cost new of the office building itself is apportioned on the basis of 54.5 per cent to the gas department and 45.5 per cent to the electric, while the warehouse is allocated on a basis of 75 per cent to the gas department and 25 per cent to the electric. The ratio of apportionment of land and office fixtures is based upon the relationship in point of numbers between the gas and electric customers. Office building and warehouse allocation is based upon an estimate of the relative quantities of space used by the respective departments. The private telephone line is assumed

to be used equally by both departments and is charged to the departments on that basis.

For the sake of convenience we will consider the items of value claimed by the utility, in the order in which they are set forth in Foster's exhibit, *supra:*

Minimum Value of Contract

The Utility secures its supply of natural gas for distribution at Shelby from the Ohio Oil Company, under terms which call for its delivery to the utility at the city gates. At the first hearing the Utility produced a copy of its contract with the wholesale company bearing date of April 20, 1927, and which, by its terms, covered a period of five years beginning with November 14, 1927. Briefly stated, the contract provides for the purchase of natural gas at the city limits on a base pressure of four ounces above average atmospheric pressure and at a standard temperature of 60 degrees Fahrenheit at the rate of 15 cents per one thousand cubic feet for the first five millon cubic feet of gas taken in any month and at the rate of 10 cents per M cubic feet for all additional gas taken in any month. At the hearing in Docket No. 1028 the manager of the Utility testified that he had been advised by the Chicago office of the Utility (the Utility is owned by the North Continent Utilities Corporation, which is in turn controlled by the William A. Baehr Organization of Chicago), that commencing with November 1, 1928, the utility was to be furnished its supply of natural gas by the Ohio Oil Company at the flat rate of 7 cents per thousand cubic feet. No writing of any kind was introduced nor any oral testimony given tending to show to what extent the contract of April 20, 1927, was modified. We do not know from the record whether the Ohio Oil Company has merely temporarily waived its rights to the contract rates in order to permit the Utility to engage in a rate war or whether the contract has been reformed so as to carry the 7-cent rate for its 5-year term. Inasmuch as the cost of gas represents a substantial portion of the Utility's operating expenses, an important factor in determining reasonable rates for future application at Shelby, the record is deficient. However, the Utility makes no greater claim for its contract value

under its alleged new rate, so that so far as the immediate subject at hand is concerned, the deficiency is not material.

[1–3] The Utility claims the sum of $75,000 as the minimum value of its contract with the Ohio Oil Company and requests that we pass that amount into the rate base upon which it is entitled to earn a fair return. From the record it appears that the company has never carried the contract on its records as an asset and that all sums of money paid to the Ohio Oil Company for natural gas purchased thereunder have been charged to operating expenses. That the contract with the Ohio Oil Company is a species of property admits of no doubt but whether, in view of the Utility's treatment of cost of gas purchased thereunder as an operating expense, it is also entitled to capitalize it in the rate base, is the question. It is true that if the Utility did not have the Ohio Oil contract or a contract with some other person or corporation, it would be under the necessity of developing its own gas supply with an added capital investment upon which it would be entitled to earn a fair return, but, whether such a course would be economically sound in view of the extensive development by private interests of the gas fields lying adjacent to Shelby, rendering enormous quantities of natural gas available to purchasers at reasonable cost, is open to serious question. As we conceive the duties of a public utility, it is incumbent upon it to produce its service as economically as practicable and that it is not free to adopt a less economical method of producing its service and charge to its patrons on the basis of such excessive cost. And, having entered into a contract which reduces the cost of obtaining its product below the cost of producing it with a plant constructed by itself, it has not the right to capitalize the difference or any part of it. If it should be made to appear that by reason of its advantageous contract, a portion of the Utility's property, theretofore devoted to the public service, is rendered obsolete or unnecessary, equity requires that it be permitted to amortize the value of such superseded property, less salvage, over a term of years out of earnings (Re Great Falls Gas Co. 21 M. U. R. —, P.U.R.1928E, 803). Our attention has been invited to a number of cases alleged to be in support of the Utility's contention, including an ex-

pression of this Commission in Public Service Commission v. Flathead Valley Electric Co. 19 M. U. R. —, P.U.R.1926C, 822. In that case it appeared that the Mission Range Power Company was engaged in furnishing electrical current, under wholesale rates, to the Flathead Valley Electric Company, a public utility engaged in serving the towns of Ronan and Pablo. The cost of the current purchased from the Mission Range Company was charged to operating expenses. In speaking of the amount of return being earned by the Utility—there being no contention made that the contract for current should be valued and capitalized in the rate base—we said:

"Of course, this figure does not take into account the value of the Flathead Valley Company's contract with the Mission Range Power Company. That is a property item and, as such, devoted to the Ronan and Pablo services. It might be capitalized and added into the aggregate which goes to make up the rate base, or the contract may be given effect by charging in its annual cost among the operating expenses. This seems to be the method generally followed by Commissions in dealing with plants of this character and so we shall not attempt any capitalization of the contract. . . ." (At p. 828 of P.U.R.1926C).

It will be noted that we said that the contract might be capitalized *or* given effect by charging its annual cost to operating expenses. In this case, the Utility asserts the right to do both, a position manifestly inconsistent with our language in the alternative.

Other cases cited by the Utility as sustaining its right to capitalize the Ohio Oil contract are: Bonbright v. Geary, 210 Fed. 44; Duluth Street R. Co. v. Railroad and Warehouse Commission, 4 F. (2d) 543, P.U.R.1925D, 226; Pacific Gas & E. Co. v. San Francisco, 265 U. S. 403, 68 L. ed. 1075, P.U.R. 1924D, 817, 44 Sup. Ct. Rep. 537; Valparaiso Lighting Co. v. Public Service Commission, 190 Ind. 253, P.U.R.1921B, 325, 129 N. E. 13; St. Louis & E. St. L. Electric R. Co. v. Hagerman, 256 U. S. 314, 65 L. ed. 946, 41 Sup. Ct. Rep. 488; Re Crystal City Gas Co. (N. Y.) P.U.R.1925E, 91; Re Duluth Street R. Co. (Minn.) P.U.R.1927A, 41, 52, and Re Kootenai Power Co. (Idaho) P.U.R.1923A, 764. A careful reading of

these cases discloses, in our opinion, situations unlike the instant one, rendering them unapplicable as precedents herein. In Bonbright v. Geary, *supra,* the power contract which the Arizona Commission failed to value was the direct cause of its generating plant, theretofore used in the public service, being abandoned. The old plant, having been abandoned, was not property used or useful in the public service and was, therefore, eliminated from the rate base. The Federal Court's conclusion that the "Corporation Commission should have given this contract a reasonable valuation in view of all of the circumstances of the case," is sustainable under the rule applied by this Commission in Re Great Falls Gas Co. *supra,* to the effect that where patents or contracts for cheaper power or new processes are introduced in a Utility's plant with the effect of quickly rendering obsolete and valueless expensive equipment, not exhausted in the service, and of reducing operating expenses, it is not fair or equitable to claim all the benefits of the improved methods for the consumers and leave the Utility to carry the burden of its superseded property on its own shoulders. (See Valuation of Public Service Corporations by Whitten (revised by Wilcox), § 719, 1928 Ed.) In the Duluth Street Railway Case, *supra,* it appeared that prior to 1907 the company had generated its own electricity in a plant owned by it. In 1907 the company entered into a contract for the purchase of electric power and the result of the deal was that the old steam plant was dismantled and abandoned. The Commission valued the contract, the Special Master disallowed the item, and it was restored to the rate base by Judge Booth, who said:

"I am not able to agree with the Master in this view. The contract was a thing of value and it differed from an ordinary contract for current supplies. It took the place of a physical plant which would have otherwise been necessary and would have been valued as a part of the physical items. Under these circumstances, I think the Commission was justified in including this power contract as an item in the rate base. . . .

"It may perhaps be open to question whether this matter of power contract and the dismantled plant might not have been

treated as an unusual obsolescence and allowance made on that basis." (At pp. 239, 240 of P.U.R.1925D.)

Pacific Gas & E. Co. v. San Francisco, *supra,* did not concern a power contract but involved the proper valuation of certain patent rights through which manufacturing costs had been greatly reduced. It appeared that the Utility paid about $46,000 for certain patent rights, the use of which rendered about $800,000 worth of the utility's property obsolete. The Supreme Court held that the amount of money actually paid to the inventors was not the proper measure of value. The question of how the patent rights should be valued was left open, the Supreme Court saying:

"Whether, under the peculiar circumstances here presented, the rate base should be fixed by adding to the agreed inventory some fair valuation of the patent rights, or whether prompt recoupment should be allowed for the obsolescence caused by their introduction, or whether appellant should be saved from actual ultimate loss by some other feasible method, we will not undertake to determine upon the present record." (At p. 828 of P.U.R.1924D.)

In the Valparaiso case, *supra,* the supreme court of Indiana held that a contract for the purchase of electric current held by the Utility was a property right and should have been valued for the purpose of rate making. The opinion further shows, however, that the Utility, after entering into the power contract, was forced to abandon a part of its plant. It made the claim that as to this abandoned property it should be allowed to include the value thereof in the rate base or be permitted to amortize its value out of its earnings. The supreme court disallowed its claim, saying:

"It should not be included in the value of this plant for rate-making purposes because it is not actually used or useful in furnishing electricity. No allowance should be made for an amortization fund to take care of this sum." (At p. 332 of P.U.R.1921B.)

This case is not inconsistent with the equitable rule above cited—it merely recognizes one method of handling superseded property. In the instant case the company never had a plant

and its contract with the Ohio Oil Company did not result in the supersession or obsolescence of any property.

St. Louis & E. St. L. Electric R. Co. v. Hagerman, *supra,* did not involve a valuation for rate-making purposes. It was there held that a contract held by plaintiff to operate its cars over a certain bridge was a property right and taxable as such. We are not disposed to question the decision but find it of no value in this case where value for rate-making purposes is the subject of inquiry.

In Re Crystal City Gas Co. *supra,* the New York Public Service Commission held that the amount paid by a natural gas company, under a contract, for the right to be furnished with natural gas from the fields of a producing company, and without which the Utility could not carry on its enterprise, should be included as part of the cost of the plant and property. But, in so holding the Commission said:

"Our decision to include this payment as part of book cost has necessarily been founded upon the peculiar facts before us in this proceeding, and the decision thereon can form no precedent with respect to the inclusion of such payments in book costs generally or in the valuation thereof in proceedings where the facts are not similar to those in the proceeding before us." (At p. 99 of P.U.R.1925E.)

The controlling fact in that case was that unless the Utility had paid the $25,000 for the right to be furnished with natural gas from the field, it could not have undertaken or carried on its enterprise as the seller controlled the gas supply in the field. In the instant case, the Utility has not paid out one cent for its contract nor does the Ohio Oil Company control the natural gas supply from the field.

In Re Duluth Street R. Co. *supra,* was a proceeding by the Minnesota Commission subsequent to the Federal Court's decision (4 F. (2d) 543, P.U.R.1925D, 226). The Commission valued the power contract held by the railway but rested its valuation thereof squarely upon the unamortized value of the power plant of the railway company which was dismantled by reason of the company's entering into the power contract.

In Re Kootenai Power Co. (Idaho) P.U.R.1923A, 764, it

appeared that the utility purchased its electrical current for distribution under two contracts—one with the Washington Water Power Company and the other designated as the "Strathern contract." Under the terms of the Strathern contract the Utility purchased current at $1,750 per annum cheaper than it would have to pay under the Washington Water Power contract. The Utility contended that its contract with the Washington Water Power Company was a fair and just one and that for its diligence in negotiating and concluding the Strathern contract it should be permitted to capitalize the savings at 7 per cent or at $25,000. The Commission found the rates provided in the Washington Water Power contract were reasonable and that the Utility was saving $1,750 annually by reason of the existence of the Strathern contract, which alleged savings capitalized at 8 per cent amounted to $21,875. As a reward for the Utility's ability to conclude the Strathern contract it was permitted, by a divided vote of the Commission, to include one-half of the capitalized savings in its rate base, the benefit of the other 50 per cent being assigned, according to the decision, for the benefit of the patrons of the Utility. It will be noted from a reading of this decision that in the valuation of the Kootenai Power Company's property the Commission did not assign any value to the Utility's contract with the Washington Water Power Company nor did it value the Strathern contract. It will also be noted that the cost of current purchased under both contracts was charged to operating expenses.

It is obvious that the Kootenai decision, *supra,* when analyzed offers no support for the Utility's contention.

[4] Considerable evidence was introduced at the original hearing tending to show that the contract between the Utility and Ohio Oil Company was improvident in that the rate charged by the Ohio Oil Company was excessive and unreasonable. It was shown that gas was purchasable in the field at from 3 to 5 cents per M cubic feet at the well, and that the witness Johnson had offered to furnish natural gas at the city limits for 7 cents per M cubic feet. In view of the fact that the Ohio Oil Company is now receiving 7 cents per M cubic feet instead of the contract rates of 15 and 10 cents and because the record is in

doubt as to the exact status of the contract of April 20, 1927, we withhold decision upon the providence or improvidence of the contract of April 20, 1927. The new rate of 7 cents per M cubic feet appears to be a reasonable rate and until it is made the subject of direct inquiry, we will assume that it is not an unreasonable rate for the Utility to pay for its gas supply at the city limits.

Land and Buildings

In Benjamin v. Great Northern Utilities Co. 17 M. U. R. 487, P.U.R.1924B, 705, we disallowed an item for $10,000 for "Land and property," on the ground that it did not appear that the land or property claimed as an asset was devoted to the gas service of the Utility. We there made reference to the fact that "it appears in substance to have been the price which Williams paid James A. Johnson for all its property and rights when Williams secured the Johnson Electric plant on November 18, 1922." The Utility now claims that of the $10,000 paid Johnson, the sum of $3,000 should be allocated to the gas department as the value of its interest in the land jointly used by it and the Utility's electric department. In rejecting this claim it is sufficient to say that the value of such portion of the land, originally purchased from Johnson, as is properly allocated to the gas department will be valued on the basis of present market value and that the value of such portion of the buildings jointly used by the gas and electric departments as is properly allocated to the gas department, will be valued on the basis of reproduction cost new less depreciation. Both of these items are treated *infra* under the heading of "Value of Physical Plant."

Clearing Way for Gas Utility

Of the sum of $10,000 paid Johnson, the Utility claims that the amount of $2,000 was paid for clearing the way for the introduction of a gas utility in Shelby. Johnson testifies in this record that the consideration for the $10,000 was as follows: $2,500 for five lots adjoining the town of Shelby, a proposed electric plant site; $1,500 for the town lots and build-

ings thereon which housed his electric light plant; and $6,000 for the electric light plant itself. As to the last mentioned figure, he states that it represented 50 per cent of the valuation placed on his plant by this Commission. Johnson is emphatic in his statement that the sale had nothing to do with bringing natural gas into Shelby. Whether or not the Utility, or its agent, purchased the Johnson Electric plant with the thought in mind of supplying natural gas to Shelby, is immaterial as we view it, as it is evident from the record that the Utility received full value for the $10,000 in land, building, and equipment.

Improvements on Land and Buildings

Discussion of this item is made under the heading of "Value of Physical Plant," *infra.*

Plan and Construction

Engineering and Superintendence

[5] For plan and construction engineering the Utility claims an allowance in the rate base of $15,000 and for plan and construction superintendence the sum of $10,000. We disallow both items. In our valuation of the plant on the basis of reproduction cost new, we have allowed 4 per cent as an overhead on all material and labor items, which we consider ample under the circumstances. We note in passing that when the Utility's plant was valued in 1923 (Benjamin v. Great Northern Utilities Co. *supra*), no claim was then put forward by the utility for such sums, nor was our order allowing the sum of $25 for engineering ever appealed from. That no such sums as is here claimed was ever expended by the Utility is clear from the company's records which contain no entry to that or similar effect and that no such sums would be required to be expended in a reproduction of the present plant is also patent from the record.

Legal Expenses

[6] The claim of $1,500 for alleged legal expenses incurred in connection with the organization of the Utility finds no substantial support in the record as to amount. In accordance with

the practice of the Commission to take care of legal and organization expenses through an allowance among the overheads, we reject the item of $1,500 for alleged legal expenses.

Value of Physical Plant

Land: As above indicated, the electric and gas departments of the Utility are housed together in one office building and jointly use the company's warehouse. The lot upon which these buildings are situated are appraised by various residents of Shelby, familiar with real estate values, at figures ranging from $750 to $2,500. Buck estimates its market value at $2,000, a figure which we believe to be substantially accurate. The land upon which the regulator station is situated is given a market value of $200. Buck's allocation of 55 per cent of the value of the office building lot to the gas department, based upon the ratio existing between the number of gas customers and electric consumers, is one of several methods that might have been employed. We are satisfied that his conclusion reflects a fair apportionment.

Buildings: Buck estimates the reproduction cost new of the office building at $4,012.46; the warehouse, $393.23, and the regulator station, at $1,186.11. The Utility offers no reproduction cost figures nor any specific figures as to the value of these buildings. We adopt Buck's estimate of value and his apportionment of 54.5 per cent of the office building and 75 per cent of the warehouse to the gas department.

Distribution System: The Utility does not question the inventory of its property as compiled by Buck. Its chief criticism of Buck's valuation of its distribution system—this also applies to services and meters—is that Buck makes no allowance for piecemeal construction and that his unit prices are too low. As to the former, it is clear that under a strict application of the reproduction method, there is no reason for the application of piecemeal methods as it is assumed that the entire property would be reconstructed by the quickest and most economical method. As to the latter, it is quite generally recognized that in the adopting of unit prices there is wide room for variation and error. (Final Report of Valuation Committee of American Society of Civil

Engineers—Proceedings, 1917, page 1311). As remarked by the authority last cited, "The unit prices on most of the items entering into a valuation are not capable of exact and absolute determination or proof. This is especially true of all items in which labor largely enters into the cost."

Buck places the reproduction cost of the distribution system, including overheads at 14 per cent, at $16,914.36. Using Foster's unit prices, same overheads as Buck, we arrive at $21,266.74. The disparity in the figures lies in the different costs allowed by Buck and Foster for labor in the laying of the mains. Buck's labor cost figures are the result of a study of actual cost data secured from similar undertaking at Havre, Chinook, and Glendive, Montana, consideration being given to wages prevailing at Shelby. Foster's estimate of labor cost is based upon a study of statistics compiled from previous valuations of natural gas plants made by him from work orders where the time consumed was shown and from studies made by street foremen in laying mains and setting meters.

Services: Buck estimates the present value of reproducing services, including overheads, at $4,761.55. Foster's estimate, using 14 per cent overheads, total $5,434.31. Again, the difference is laid to the use of different labor costs.

Meters and Regulators: Under this heading Buck has placed the reproduction cost new of meters, regulators, installations at electric plant and regulator station, at $14,559.75. Applying Foster's unit prices and 14 per cent overheads to meters and regulators installed (no question being made as to installation equipment), the total is $15,145.78.

It is perhaps true that Buck in the construction of unit prices has not given sufficient recognition to Shelby's proximity to the oil field and the influence that high wages in the field exerts on the price of labor at Shelby. In view of the fact that there has been no great fluctuation in material prices since the last valuation of the Utility's gas plant and the further fact that its construction expenditures on its system indicate a much higher cost than Buck's estimate, we are inclined to view that under the particular circumstances of this record, the application of

Foster's unit prices will more accurately reflect the reproduction cost of the above items.

Overheads: The Utility contends for an allowance of 20 per cent to cover construction overheads as against 14 per cent employed by Buck. We see no occasion to depart from our experience standard in this respect, which Buck has followed.

[7] *Depreciation:* The Utility makes no showing as to the amount of depreciation existing in its plant contenting itself with the assertion that it is rendering 100-per cent service. But, as we have heretofore pointed out (Re Union Electric Co. 21 M. U. R. —, P.U.R.1928E, 396), the fact that a Utility is rendering efficient service does not establish the fact that depreciation in its plant is nonexistent. Buck has, after inspection, made an estimate of the per cent condition of the various units and we adopt his findings in this respect. Due to the fact that we have increased the estimated reproduction cost of certain items, above noted, the specific amount of depreciation as found by Buck must be corrected to $8,338.42.

Working Capital

[8–10] Working capital in a rate proceeding is quite generally held to be the amount of the capital which the investors are required to put into a business over and above the investment in plant and intangibles in order to cover the gap between cash expenditures in the production and delivery of service and the collection of revenue from the sale of service (Re Union Electric Co. *supra;* Whitten-Wilcox, "Valuation of Public Service Corporations," § 780). In this case the Utility claims the sum of $13,500 as a fair allowance in its rate base for this purpose. Buck estimates the sum of $4,000 as being an outside figure—this to include material and supplies as well as cash working capital. The figure submitted by the Utility was compiled by the company's auditor by taking operating expenses for a 45-day period, adding thereto the total of accounts receivable, material and supplies on hand, and cash in till and on deposit. Buck's estimate is influenced largely by the practice of certain utilities in setting aside a sum equal to one-ninth of its annual operating expenses, a practice based upon the assumption that

it takes about six weeks to get in receipts from service sold. Buck also took into consideration the maximum amount paid in any one month for gas purchased, average monthly pay roll expense, and the quantity of material and supplies reasonably necessary to have on hand. We do not agree with either estimate. No hard and fast rule for determining the amount of working capital has been devised because each Utility presents an individual case. In each case the working capital requirement is to be measured by the amount of funds necessarily furnished by the Utility to keep operations running smoothly, safely, and economically. This Utility stands in a much different position than the one that produces and delivers service and pays for the cost of production and delivery in advance of the receipts of its revenues therefrom. The principal items of the Utility's operating expenses are cost of gas purchased and pay roll of officers and employees. Under its contract with the Ohio Oil Company, the Utility settles for gas purchased on or before the 20th day of each month for all gas taken during the preceding month. Its meter-reading date for consumers is about the 23d of each month and all customers' bills are due and payable on the first of the month next succeeding the meter-reading date. The practical effect of the arrangement is that the Utility receives considerable money from its customers upon a resale of the gas purchased by it from the Ohio Company before it settles with the wholesaler. The Utility does not provide any discount for prompt payment but under our standard rules and regulations it has the right to insist upon reasonably prompt payment or to discontinue service upon 24-hours' notice, and in cases of doubtful nonproperty owning customers, to require a deposit in advance to cover an estimated 45-day bill. The Utility asserts that during the past five years, delinquency in consumers' account has varied from $2,000 to $3,500; but if that is true, it bespeaks an indulgence on the part of the Utility that is not chargeable to the customers in general. Our regulations, above adverted to, were designed to insure promptitude in payment and any burden caused by a waiver in their application is to be borne by the Utility and not its patrons. In 1927, the Utility disbursed in wages to its officers and employees the

sum of $4,988.66, or an average of $415.72 monthly. Wages of officers and employees are properly payable promptly on the first day of the month next succeeding the month during which the services were performed and it is, therefore, necessary that the utility have on hand finances to meet the pay roll. It is likewise proper and essential that the Utility have in the till or on deposit a cash balance sufficient to maintain credit and meet irregular demands that may arise, the amount of which is largely a matter of judgment under the facts and circumstances of each case. Consideration must also be given to the amounts of money the Utility has on hand in its depreciation reserve, surplus and accrued taxes accounts. To the extent that the balance in the reserve at any time is not invested in additions necessary to maintain the property as a whole in stable condition per cent of cost new, to the extent that the surplus represents money accumulated for dividends and not yet payable as such in the normal course and to the extent that it has been set aside in its accrued taxes account funds with which to meet its tax obligations not payable until the latter part of the calendar year, these funds tend to offset working capital requirements. Taxes in Montana are payable for the calendar year, one-half on or before November 30th, of such year and the other half on or before May 30th, of the succeeding year. The Utility, under our uniform classification of accounts system is required to set up on its books as an operating expense for January one-twelfth of the total taxes for that year, but not being under the necessity of paying only one-half thereof on November 30th of that year, it has in its possession sums collected as revenue, ranging from a minimum of five months tax accruals to eleven months. Assuming that the Utility's taxes for 1927, namely, $1,437.23, is approximately its normal annual tax, it has a tax accrual of approximately $122 per month, or it has on hand at all times in this tax account a fund ranging from $610 to $1,342, which tends to reduce its working capital requirements, as deferred payments to plaintiff may be compensated in deferred payments by it.

Under its new arrangement with the Ohio Oil Company, its annual cost of gas purchased is reduced approximately 50 per

cent. Upon the assumption that the amount of gas purchased for the twelve months ending August 31, 1928, is typical, its cost would be $9,800, or an average of $816.67 per month, as against an average monthly cost of $1,785.42 for 1927. But it is apparent from the record that unless conditions change, the Utility will not purchase nor sell as much gas in the future by reason of the competition offered by the Citizens Gas Company, which has already acquired some 135 former customers of the Utility. Under the circumstances of the record we find that $1,250 is a fair allowance for cash working capital.

[11] As to the amount of supplies and materials that should be allowed for in working capital, this also is a matter of judgment based upon the actual requirements of the Utility. A mere inventory of material and supplies on hand at any given period is not conclusive and often not even persuasive of the proper amount to be allowed. Material and supplies carried in stock by the Utility for the purpose of making repairs, installations, etc., are as much a part of its property devoted to the public service as is its main plant. It is of utmost importance that there be no cessation in public service and that a prospective consumer wishing to attach himself to a Utility's service should not be postponed in securing a connection. Having in mind the size of the plant herein involved, the fact that the Utility undertakes no obligation with reference to the pipe line leading from the gas wells to the city limits, the number and location of its customers, and all other factors that affect the situation, we are of the opinion that $1,250 is a fair allowance for material and supplies.

Cost of Financing

[12] With respect to cost of financing, we disallow the utility's claim in accordance with the views expressed in Re Great Falls Gas Co. 21 M. U. R. —, P.U.R.1928E, 803, *supra*.

Going Concern

[13] The valuation of the Utility's property herein is made on the basis of it being a going concern. For the reasons stated

in Re Union Electric Co. 21 M. U. R. —, P.U.R.1928E, 396, we decline to make any specific allowance for going concern value.

Present Fair Value

From the above findings we conclude that the present value of the Utility's property, used and useful, at Shelby, Montana, devoted to natural gas service for the convenience of the public as of January 1, 1928, was $43,214.22. Construction expenditures between January 1, 1928, and August 31, 1928, amounted to $2,877.50. At the December 20th hearing, the manager of the Utility advised the Commission that the value of its property was the same as stated by the witness Foster at the October 1st hearing. Thus, by adding the actual construction expenditures for 1928, without deducting any depreciation, we arrive at the sum of $46,091.72 as the present value of the Utility's property as of the last date of inquiry. The following table summarizes our findings to reproduction cost new, depreciation, and present value:

Item	Reproduction cost	Depreciation	Present value
Land	*$1,300.00		*$1,300.00
Buildings:			
(a) Office and warehouse	2,481.71	$248.17	2,233.54
(b) Regulator houses	1,186.11	59.30	1,126.81
Distribution:			
(a) Mains	21,266.75	4,253.35	17,013.40
(b) Services	5,434.31	1,902.01	3,532.30
Meters and regulators	15,145.78	1,514.58	13,631.20
Shop tools	395.24	197.62	197.62
Office equipment	600.61	30.03	570.58
Miscellaneous:			
(a) Car	285.00	85.50	199.50
(b) Telephone	957.13	47.86	909.27
Additions in 1928	2,877.50		2,877.50
Totals	$51,930.14	$8,338.42	$43,591.72
Working capital			2,500.00
Total present value of gas utility			$46,091.72

* market value.

Revenues and Expenses

The annual report of the Utility for the calendar year 1927 shows the following revenues and expenses:

Total operating revenues		$59,563.04
Operating expenses:		
Production	$21,425.12	
Distribution	2,321.35	
Commercial	3,298.73	
General	9,451.16	
Undistributed	1,067.37	
Depreciation	3,000.00	
Taxes	1,473.36	
Total operating expenses		42,037.09
Net operating revenue		$17,525.95

Our analysis of the Utility's books for the 12-month period ending August 31, 1928, shows revenues and expenses as follows:

Total operating revenues	$52,965.65	
Total operating expenses	39,061.68	
Net operating revenues		$13,903.97

Foster in his exhibits sets up revenues and expenses for the same two periods, as follows:

	1927	12 months ending Aug. 31, 1928	
Total operating revenues	$59,563.04	*$51,958.74	
Total operating expenses (including taxes but excluding depreciation)	39,037.09	†35,512.04	
Net operating revenue	$20,525.95	$16,446.70	
Deduct Federal income tax	878.12	1,466.71	(est.)
Total available for depreciation and return	$19,647.83	$14,979.99	
Fair allowance for depreciation	4,470.52	4,700.72	
Total available for return	$15,177.31	$10,279.27	

* Adjusted to reflect rates that went into effect in October, 1927.
† Adjusted to reflect cost of gas under April 20, 1927 contract.

Whether we accept the figures from the annual report, Buck's compilation, or Foster's set-up, it is apparent without any further analysis that upon the rate base we have found herein as representing the fair value of the utility's gas property, the rate of return to the Utility has been unreasonable and excessive, justifying the conclusion and finding, which we hereby make, that the rates that were in effect when this inquiry was commenced and the rates that were approved tentatively pending completion of this investigation were and are unjust and unreasonable rates.

[14] In connection with the revenues of the Utility we note monthly charges against the electric department for gas furnished to it by the gas department. Taking December 1927, for example, the records of the Utility show that during that month the electrical department used 3,804,700 cubic feet of natural gas for which the gas department received a credit of $570.70, which figures out at the rate of 15 cents per thousand cubic feet, which was the contract price at that time for any amount less than five million cubic feet. The practical effect of selling gas to the electrical department at contract price is to prefer electrical consumers to the prejudice of gas consumers. It requires extra mains and equipment to serve the electrical department. These are carried as part of the gas investment. The gas consumers not only carry the added investment upon which they are required to pay a fair return, but must likewise carry the burden of depreciation and taxes on the increased investment, maintenance expense on the additional equipment and leakage in the mains, specially required to serve the electrical plant. The Utility doubtless has the right to furnish its electrical department with gas at cost but that cost must truly reflect all items that properly enter into a determination of cost. That this item is of no small consideration is apparent from the fact that during 1927 practically 21 per cent of the total gas purchased during the year was transferred to the electrical department and settled for on the basis above suggested.

[15] Comparing operating expenses of the Utility for 1927 with previous years, we find that the operating expenses, exclusive of cost of gas purchased and depreciation, have, in the aggregate, taken a decided upward trend. To illustrate: in 1924, the total operating expenses of the Utility (less cost of gas purchased and depreciation), amounted to $10,019.03; in 1925, $11,670.11; in 1926, $12,558.94, whereas, in 1927 it totaled $17,611.97, and for the 12-month period ending August 31, 1928, amounted to $18,528.16. Part of the abnormal increase reflected in the last two figures is to be found in the alleged expense incurred by the Utility in connection with our hearing of November 29, 1927. According to the Utility's books, it expended $4,386.25 in connection with this hearing.

The largest single item is for alleged "special services Chicago office," in the amount of $2,849.27. Neither the records of the company in Montana, nor the testimony of the witnesses for the Utility, offer any itemization or reasonable explanation of the charge, nor can we from an examination of the transcript of that hearing find any such special services. In view of the fact that after paying all of the alleged expenses incurred in connection with the first hearing, the Utility was able to and did earn an excessive rate of return, we do not feel called upon to say any more than that if the merits of payments to the Chicago office for alleged special services become material in any future proceeding on the question of whether or not the Utility is earning a fair return, before the Commission will accept such payments as legitimate operating expenses, it will require proof of actual service and evidence of the reasonable value thereof. Ordinarily, the costs legitimately incurred in connection with a rate proceeding should not be paid out of current revenues but should be amortized over a reasonable term of years.

Docket No. 1028

[**16, 17**] In justification of its Schedule 4-A sheet 2, the Utility develops of record the fact that it has been engaged in the distribution of natural gas at Shelby since the forepart of 1923; that prior to the month of October, 1928, it was the only Utility furnishing such service at Shelby; that during October, 1928, the Citizens Gas Company completed the construction of a distributing system at Shelby and commenced selling natural gas in competition with the Great Northern Utilities Company, at a schedule of rates lower than the Great Northern's, the base rate of the new company being 15 cents per thousand cubic feet lower than that of the Great Northern's; that with the advent of the Citizens Gas Company into the Utility's field, the Great Northern lost to the Citizens Gas Company 137 customers, two of which had been recovered at date of hearing, and that in order to protect its investment in its gas property at Shelby it has decided upon a schedule of rates commencing with a base rate of 15 cents lower than the base rate of its competitor. No evidence was introduced tending to show the Utility's probable

operating revenues and expenses under the new schedule. So far as the manager of the Utility was informed by the Chicago office where the proposed schedule was drawn, no rate study was prepared in connection with the new tariff. In his opinion the rate proposed is not a reasonable one from the utility's standpoint but is justified under the competitive conditions existing at Shelby. To quote his language from the record:

"Rate regulation is just and equitable under ordinary conditions but a competitive situation has arisen at Shelby which forces the Great Northern Utilities Company to protect its investment in the most thorough manner possible and we are willing, if required, to forego for the present the net earnings to enjoy the greatest ultimate benefit."

He further stated that in the event the Citizens Gas Company should meet the new rates as proposed in Schedule 4-A, the Utility would propose further reductions. In other words, the Utility has thrown down the gauntlet of battle to its competitor and insists upon a fight to a finish.

At the outset, the Utility takes the position that the Public Service Commission Act (Chap. 52, Laws of 1913, §§ 3879 to 3913, inclusive, R. C. M. 1921), does not contain any grant of power to this Commission authorizing it to make and enforce minimum as distinguished from maximum rates or to prescribe specific rates and that a public utility is free to charge any rate it may see fit provided that such rate does not exceed a maximum reasonable rate. If the Utility is correct in its contention, the Commission has no choice in the premises but to approve Schedule 4-A as the rates stated therein are admittedly below the level of a maximum reasonable rate.

It, therefore, becomes necessary to examine the provisions of the Public Service Commission Act to determine whether or not the legislature has in its provision for a comprehensive and uniform system of regulation and control of public utilities by the state through this specially created tribunal limited the Commission in rate matters to the establishment of reasonable maximum rates. It is settled law that agencies such as a Public Service Commission have "such powers and such only as are conferred upon it by statute either expressly or by necessary

implication." (Chicago, M. & St. P. R. Co. v. Railroad Comrs. 76 Mont. 305, P.U.R.1926E, 415, 247 Pac. 162), and that "the Commission is a mere administrative agency created to carry into effect the legislative will. It has only limited powers, to be ascertained by reference to the statute creating it, and any reasonable doubt as to the grant of a particular power, will be resolved against the existence of the power." (State ex rel. Thacher v. Boyle, 62 Mont. 97, 204 Pac. 378).

Section 5 of the act (3883) provides that "the charge made by any public utility for any heat, light, power . . . produced, transmitted, delivered or furnished, or for any service to be rendered as or in connection with any public utility, shall be reasonable and just, and every unjust and unreasonable charge is prohibited and declared unlawful." Section 11 of the Act (3891) provides that every public utility shall file with the Commission schedules, open to public inspection, showing all rates, tolls, charges, which it has established, and that "no change shall thereafter be made in any schedule . . . except upon 20-days' notice to the Commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect; provided, that the Commission, upon application of any public utility, may prescribe a less time within which a reduction may be made; *provided, however, that no advance or reduction of existing schedules shall be made without the concurrence of the Commission.*" Section 12 (3892) provides that "it shall be unlawful for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect, or receive any rate, toll, or charge not specified in such schedules. The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges until the same are changed, as provided in this act." Section 17 (3897) provides, among other things, for the filing of complaints, by parties directly interested, against unreasonable or unjust rates and for hearings thereon. Section 19 (3899) authorizes the

Commission: "If, upon such hearing . . . the rates, tolls, charges, schedules . . . shall be found to be unjust, unreasonable or unjustly discriminatory . . . *the Commission shall have the power to fix and order substituted therefor, such rate or rates, tolls, charges or schedules, as shall be just and reasonable.*" The same section authorizes the Commission to proceed upon its own motion to investigate rates, etc., and after a full hearing "by order make such changes as may be just and reasonable, the same as if a formal complaint had been made." Section 25 (3905) declares: "All rates, fares, charges . . . fixed by the Commission shall be enforced, and shall be prima facie lawful, from the date of the order until changed or modified by the Commission," or by order of court upon a proper review of the Commission's actions.

Construing the act so as to give effect to all its parts, the conclusion appears inevitable that it was the intention of the legislature to clothe the Commission with the power to regulate rates and to fix a specific rate, instead of a mere maximum. The provision that we shall have the right to fix and substitute just and reasonable rates, after investigation and hearing, for rates being charged by a Utility and the express declaration that no advance or reduction of existing schedules shall be made without the concurrence of the Commission bespeak a legislative intent wholly at variance with the Utility's contention herein. It is only reasonable to assume that if the legislature intended that the Commission should only have the power to fix maximum rates that it would not have placed any restrictions upon reductions in rates below the level of existing schedules except the requirement that such reductions be filed with the Commission. The fact that a reduction in existing schedules cannot be made without the concurrence of the Commission clearly indicates that such a reduction cannot be made as a matter of right. As was pointed out by the supreme court of Montana in Northern P. R. Co. v. Bennett, decided December 27, 1928, 272 Pac. 987, 992: "The requirement that a person must secure leave from some one to entitle him to exercise a right, carries with it, by irresistible implication, a discretion on the part of the other to refuse to grant it, if in his judgment, it is improper or

unwise to give the required consent." In determining whether or not the Commission shall concur in a proposed advance or reduction in existing schedules, our judgment is to be measured by the provision that rates charged by a utility shall be just and reasonable—fair to the consumer and fair to the Utility.

[**18, 19**] It is conceded that the rates embodied in Schedule 4-A will not yield a fair return to the Utility. Further, the record supports the finding that the preferred rates will not even yield enough revenues to defray normal operating expenses, including a fair allowance for depreciation, under existing conditions at Shelby, nor would they provide sufficient income to cover normal operating costs if conditions were the same now as they were during the calendar year 1927 when the Utility sold more natural gas than it had during any year since its entry into the Utility field. Assuming that the Utility has the right to waive its right to a fair return, or any part of it, it is apparent to us that it cannot waive its rights to such an extent as to imperil or impair its ability to render dependable, adequate service to the public it serves. It is a primary duty of a public utility to properly maintain its plant and equipment to the end that it can render adequate service to the residents of the territory it professes to serve. Quality of service and freedom from interruptions in service are just as important to consumers as are reasonable rates. In this modern day communities have become so dependent upon services furnished by public utilities for the successful prosecution of industries and for use in the home that any impairment in efficiency or continuity of service would not only result in serious inconvenience but in many cases downright hardship. The Utility must look to its rates to provide its operating expenses. If they are insufficient, curtailment or entrenchment generally ensues; competent personnel is often replaced by mediocre and less expensive employees; ordinary repairs are neglected; inferior materials are used in making absolutely necessary repairs and retirement of units, worn in the service, postponed, all tending to affect the quality of the service and to render probable serious interruptions in the service. So it is perfectly plain to us that any rate schedule that would tend to produce such results is detrimental

to the public interests and, therefore, unjust and unreasonable. By reason of the findings and views hereinabove expressed, we conclude that the rates set forth in Schedule 4-A, sheet 2 are unjust and unreasonable and we, therefore, decline to concur in or approve the same.

It has been the practice of this Commission in the past in cases involving the establishment of rates for utilities engaged in rendering the same character of service in the same locality to determine a just and reasonable rate for application in the particular locality and require both utilities to serve at that rate (Public Service Commission v. Blue Flame Gas Co. 19 M. U. R. —, P.U.R.1926D, 314). This same view has been expressed by other Public Utility Commissions (Re Los Angeles Gas & E. Corp. (Cal.) P.U.R.1927C, 545; Re Southern California Gas Co. (Cal.) P.U.R.1919D, 155, P.U.R.1918A, 604; Re Street Railway Rates (D. C.) P.U.R.1921E, 13; Pacific Gas & E. Co. v. Great Western Power Co. 1 Cal. R. C. R. 203).

The following quotation from the Blue Flame Gas Case, *supra,* at pp. 319, 320, is apropos of the present situation:

"However, it has been conclusively demonstrated in almost every small community where the experiment has been tried, that the grant of franchises to competing public utilities is wrong in principle and invariably results in unsatisfactory service. Competition has long ceased to be potent as a regulatory factor in public utility operations. Where it was relied upon, it proved to be bad in the long run for consumers of utility service, as it too often meant duplication of facilities in a field not large enough to support more than one company. The usual outcome of this was consolidation, followed by recoupment by means of high rates of losses due to competition. It has taken a long time for the public to understand that competition as a regulator of charges in the public utility industry is a failure, and even now, the fact is not appreciated by casual observers. (1 Spurr on 'Guiding Principles of Public Service Regulation,' p. 1).

"We would feel recreant to our duty if we did not in unmistakable terms denounce the admission of competing public utilities into small communities such as Kevin. The sooner this

idea is abandoned and reliance placed upon the power of the state to secure adequate service, and by appropriate rate regulation curb the natural tendency of monopolies, the better will be the service rendered by many public utility owners in small Montana towns, whose plans for improving and extending their service are constantly harassed by suggestions of the admission of competitors. Under existing law the Commission must recognize the right of both corporations to serve the community of Kevin, and in so doing, it must make rates influenced by competition. Were we to promulgate schedules having exact relation to the value of the property devoted by each corporation to the service, one schedule would undoubtedly be lower than the other, with the result that the utility serving at less cost would enjoy a legal advantage over its competitor. Even our wide-open system of franchises does not seem to countenance such a result. At the very least those who undertake such services are entitled to the good faith of city councils and nonconfiscatory treatment by this body.

"In keeping with our recorded practice, we shall approve the same rates for both utilities and leave the question of survival to the ability of one management or the other to render a superior and more attractive service than that rendered by its competitor."

Our attention is called to a recent decision of the supreme court of Utah (Logan City v. Public Utilities Commission, P.U.R.1929A, 378, 271 Pac. 961), in which the court was called upon to review the action of the Utah Commission in placing the municipally owned electric plant of Logan City upon the same rate basis as the Utah Power & Light Company, which also served consumers residing in Logan City. The action of the Commission in so far as it fixed rates for the city of Logan's municipal plant was annulled, the high court holding that under the Utah Constitution the Public Utilities Commission had no authority to fix rates for municipal plants even though it be assumed that a municipal plant fell within the definition of a public utility as found in the Public Utilities Act. Wholly by way of *obiter dictum,* as we view the decision, a majority of the court took the Commission to task for placing the two utilities —one privately owned, one publicly owned—on the same rate

basis. While there is language in the decision tending to support the views herein urged by the Utility, we are not impressed with the applicability of that case as a precedent to be followed herein for several reasons. In the first place, and this is the controlling consideration, the Public Utilities Act of Utah (Chap. 47, Laws of 1917), does not contain a provision with respect to the right of a Utility to change existing schedules such as is found in our law, (cited *supra*). Under § 3 of the Utah Act, it appears that a public utility can change its schedules upon 30-days' notice to the Commission and public in the manner and form prescribed. There is no provision that the Commission must concur in changes. Secondly, the fact that the dispute was between a municipally owned plant and a privately owned utility renders it distinguishable from the instant proceeding. As to the suggestion in the decision that the Commission should have fixed a maximum rate beyond which neither competitor could go in establishing rates with the privilege in each to render service at a lower rate, we believe it to be wholly at odds with the modern trend of thought in public utility regulation (Idaho Power & Light Co. v. Blomquist, 26 Idaho, 222, 141 Pac. 1083, 1089, 1090; Guiding Principles of Public Service Regulation, by Spurr, Vol. 1, p. 1). It is particularly so, in our judgment, because the Utah Act has the provision requiring a utility to secure a certificate of public convenience and necessity before entering into the public utility field in a given territory. Idaho has a Public Utilities Act substantially similar to Utah, yet its supreme court, in Idaho Power & Light Co. v. Blomquist, *supra*, draws conclusions as to the effect and intent of its act directly at variance with the Utah decision. We quote, with approval, from the Idaho decision:

". . . there never can be any permanent competition in matters of this kind. . . .

"Under these various utility acts, the Commission is generally given power to regulate rates and fix a specific rate, instead of a mere maximum, and that took away the opportunity for rate cutting, one of the principal instruments of warfare between such corporations. Under the act in question, the Commission is given power to fix the rate absolutely, and neither of the

competing companies can charge more or less than the rate fixed. . . .

"The rate to be determined by the Commission in each case is a reasonable rate—a rate fair to both the consumer and the supplier. . . .

"If rates are absolutely fixed by the Commission, with no permission to the utilities corporations to charge more or less, the public can receive no advantage from competition. Experience shows that while the people, or some of the people, may receive a temporary advantage from cut-throat competition, the general public can receive no substantial advantage therefrom."

See also Economic Gas Co. v. Los Angeles, 168 Cal. 448, 143 Pac. 717, Ann. Cas. 1916A, 931.

The matter of prescribing just and reasonable rates under conditions of competition such as we find here is not free from considerable difficulty. A "just and reasonable rate" within the meaning of the statute, *supra,* is, in the nature of things, incapable of precise definition as is any expression containing the words "just and reasonable." We are constrained to agree with the supreme court of Kansas when it says (State ex rel. Hopkins v. Southwestern Bell Teleph. Co. 115 Kan. 236, P.U.R.1924D, 388, 406, 223 Pac. 771):

"If a reasonable rate could be exactly and accurately defined, much of the difficulty attending rate regulation would be solved."

Perhaps one of the best definitions of a just and reasonable rate to be found in the cases is the definition given by Justice Swayze in Public Service Gas Co. v. Public Utility Comrs. 84 N. J. L. 463, 87 Atl. 651, 655, affirmed 87 N. J. L. 581, 94 Atl. 634, 95 Atl. 1079, where the learned jurist said:

"The next question is whether the rate fixed was just and reasonable. On the one hand a just and reasonable rate can never exceed, perhaps can rarely equal, the value of the service to the consumer. On the other hand it can never be made by compulsion of public authority so low as to amount to confiscation. A just and reasonable rate must certainly fall somewhere between these two extremes, so as to allow both sides to profit by the conduct of the business, and the improvements of methods and increase of efficiency. Justice to the consumer, ordinarily,

would require a rate somewhat less than the full value of the service to him; and justice to the company would, ordinarily, require a rate above the point at which it would become confiscatory."

Substantially, this is the same definition given in State ex rel. Hopkins v. Southwestern Bell Teleph. Co. *supra,* at p. 406, where the court said:

"Neither rates that do not yield a fair return nor rates that are prohibitive can be said to be reasonable. . . .

"A rate that will not permit an adequate return on the value of the property used to produce the service for which the rate is charged, where the user is not required to pay the full value of the service rendered, may safely be said to be unreasonable. A rate that is so high that those who are free to accept the service or refuse it will refuse to take it rather than pay the rate charged, may be safely said to be unreasonable. Somewhere between these two extremes lies a reasonable rate. For the purpose of this case, a reasonable rate may be defined as one which provides an adequate return on the value of the property used in producing the service, and which, where patrons may accept or refuse the service, as they choose is low enough to induce all who desire the service to pay the rate. In this attempt at a definition it has been assumed that the telephone exchanges in controversy have been built where they were needed; that they have been properly constructed; that they were economically built; and that they have been well managed."

The above quoted definitions and the authorities generally recognize the rule that a public service company furnishing natural gas (or other product or service) to the public is entitled to a fair rate upon the present fair value of its property used and useful in the public service, to be ascertained at the time the service is rendered. They also recognize the limitation upon this rule, namely, that a Utility will never be permitted to charge more than the worth or value of the service which it is rendering. (Elkins v. Public Service Commission, 102 W. Va. 450, P.U.R.1927B, 270, 135 S. E. 397; Alexandria & W. R. Co. v. Railroad Commission, 143 La. 1067, 79 So. 863; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep.

418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; Covington & Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Darnell v. Edwards, 244 U. S. 564, 61 L. ed. 1317, 37 Sup. Ct. Rep. 701; Simpson v. Shepard, 230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18; Guiding Principles of Public Service Regulation, by Spurr, Vol. 3, p. 528; Groninger on Public Utility Rate Making, 145; Valuation of Public Service Corporations by Whitten (as revised by Wilcox) § 872). Were we to attempt to apply the principle of a fair return upon a fair value in this case, we would arrive at a manifestly exorbitant rate. The duplication of plants at Shelby has increased the capital investment in property devoted to the public service but it has not increased one whit the value or worth of service to the consumer. To the extent that the existence of the two systems has resulted in the employment of property in the public service in excess of that reasonably required in the public service, it presents a case similar to one of overinvestment by a public utility, where it is rightfully recognized that the burden of overinvestment must not be shifted on to the shoulders of the consumers. Unrestricted competition tends to temporarily depress rates below the plane of reasonableness. Under free competition utilities feel compelled to accept business which pays for the direct cost and very little more. On account of the difficulty of estimating even the direct cost they sometimes accept business at prices returning less than the direct cost. Under a system of regulated competition the self-destructive nature of free competition is eliminated. Competition becomes a matter of furnishing better or more attractive service by the respective competitors rather than the sale of products or service at lower prices. The reasonableness of the rate charged for service is or should be based primarily upon its inherent reasonableness to the consumer. It is inevitable that two companies serving a territory that legitimately offers but enough business for one of the companies to operate on at a fair profit will have to respectively accept a return that will be less than a fair return under ordinary conditions. The rate or rates permitted to be

charged must, in our judgment, reflect the fair cost of serving the consumer plus a fair allowance for return.

Referring, then, to the situation at Shelby we find from the record that the community affords an annual natural gas consumption of approximately 120,000,000 cubic feet; that natural gas is purchasable at the city gates at 7 cents per M cubic feet; that by reason of line losses, estimated at 10 per cent, the utility is only able to deliver 900 cubic feet of each 1,000 cubic feet purchased, thereby making the cost per thousand cubic feet of gas *sold* 7.777 cents.

We know from the annual reports of the Utility as well as from some of the exhibits in this record that the experience of the utility shows that, exclusive of the cost of gas purchased, it costs (without any consideration of cost of maintaining a proper depreciation reserve) from 12.25 cents to 15.49 cents per thousand cubic feet of gas sold to do business. The following summary illustrates the utility's experience in this regard.

Year	M. cu. ft. of gas sold	Operating costs other than cost of purchase	Cost per M. cu. ft. sold
1924	72,233.3	$10,019.03	13.87 cents
1925	93,246.3	11,670.11	12.51 "
1926	102,540.2	12,558.94	12.247 "
1927	129,434.4	17,611.97	13.6 "
1928*	119,611.1	18,528.16	15.49 "
Average cost			13.543 "

* 12-month period ending August 31, 1928.

It would thus appear that the cost of gas purchased and cost of doing business (taking the average cost above as approximately correct), when translated into cost per thousand cubic feet of gas sold amounts to 21.32 cents. To this must be added the cost of maintaining a proper depreciation reserve fund, a cost universally recognized as a proper charge to operating expenses. In the former hearing 8 per cent was fixed as the depreciation annuity for this Utility. On that basis and our findings above a fair allowance for depreciation is $3,383.34. Distributing that cost over 120,000 M cubic feet it amounts to 2.82 cents per M cubic feet of gas sold. Rate of return at 8 per cent on the present value of the utility's property amounts to $3,687.33, or about 3 cents per M cubic feet of gas sold. Aggregating the above costs per thousand cubic feet of gas sold, it appears that a

schedule of rates that will yield an average revenue of 27.13 cents per M cubic feet sold would, under ordinary circumstances, represent a schedule of rates that is capable of earning enough revenues to pay all operating expenses, including depreciation, and a fair return upon the value of property necessarily required to render adequate natural gas service to the consumers of Shelby.

A consumers' analysis compiled by Buck reveals the following facts regarding consumption and revenue:

Block M. cu. ft.	Total M. cu. ft. sold	Revenue	Per cent of total Gas sold	Revenue
0 to 3	1,541.4	$1,564.98	1.23	2.843
3 to 10	10,739.10	5,550.52	8.54	10.086
10 to 20	23,895.60	11,513.25	19.02	20.921
20 to 50	37,345.1	16,784.52	29.72	30.499
50 to 300	37,254.4	14,543.23	29.65	26.427
Over 300	14,888.	5,075.15	11.84	9.222

It thus appears that while approximately 58.5 per cent of the consumption has been in the blocks below 50,000 cubic feet monthly consumption, approximately 64.35 per cent of the revenue has accrued from this source. A rate schedule, responsive to the above analysis, that will yield approximately 27 cents per thousand cubic feet of gas sold, should—employing the type of block schedule now in effect—be as follows (all rates net and subject to a minimum bill of $1.50, the present minimum):

First 10,000 cubic feet per month	35¢	per M. cu. ft.
Next 10,000 cubic feet per month	30¢	per M. cu. ft.
Next 30,000 cubic feet per month	27½¢	per M. cu. ft.
Next 250,000 cubic feet per month	25¢	per M. cu. ft.
All over 300,000 cubic feet per month	22½¢	per M. cu. ft.

This schedule of rates is in our judgment a schedule of just and reasonable rates. What rate of return such a schedule will yield under the competitive conditions now existing at Shelby will depend largely upon the ability of the management to attach new customers, increase consumption among present consumers and to effect such economies in operation as are consistent with adequate service.

An appropriate order will be entered.

ORDER

At a session of the Public Service Commission of Montana, held in its office in the Capitol, Helena, Montana, Tuesday,

January 22, 1929, present Chairman Boyle and Commissioners Young and Dennis, there regularly came before the Commission for final action the matters and things involved in Dockets Nos. 991 and 1028, and it appearing that the Commission has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all matters and things involved have been duly investigated and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Commission being fully advised in the premises.

It is *ordered* that Schedule 4-A, sheet 2, filed by the Great Northern Utilities Company with the Commission on November 19, 1928, stating rates for natural gas service available for all classes of service at Shelby, Toole county, Montana, be not concurred in and that said Schedule 4-A, sheet 2, shall be, and it is hereby disapproved and rejected.

It is *further ordered* that the Great Northern Utilities Company shall on or before the first day of February, 1929, file with the Commission a schedule of rates for natural gas service at Shelby, Montana, effective as of February 1, 1929, and until further order of the Commission, which schedule of rates shall be embodied in a tariff known as Tariff No. 4, as follows, to-wit:

First 10,000 cubic feet per month	35¢	per M. cu. ft.
Next 10,000 cubic feet per month	30¢	per M. cu. ft.
Next 30,000 cubic feet per month	27½¢	per M. cu. ft.
Next 250,000 cubic feet per month	25¢	per M. cu. ft.
All over 300,000 cubic feet per month	22½¢	per M. cu. ft.

Minimum bill $1.50.

It is *further ordered* that the secretary shall serve a true copy of this report and order upon each of the parties hereto, and that the same shall be in full force and effect forthwith according to its terms.

Young, Commissioner, dissenting: I can not agree with the majority in ordering in the above rates. I am not concerned about the so-called "rate war" in Shelby but am interested in obtaining the very best rates for the consumers, and when a utility voluntarily reduces its rates, as in this instance, I am in favor of giving the customers the benefit of the reduction instead of denying them the relief offered. In my humble opinion, the

Public Service Commission Law was not passed to prohibit rate reductions. Therefore, I wish to be recorded as voting for the approval of Schedule 4-A proposed by the Utility naming 20 cents per M cubic feet for the first 300,000 cubic feet, and 15 cents per M cubic feet for all over, which is almost 100 per cent lower than the rates ordered established by the majority of the Commission.

WEST VIRGINIA PUBLIC SERVICE COMMISSION.

RE NEW-KANAWHA POWER COMPANY.

Water power — Notice to Federal Commission — Navigability of streams.

A memorandum of the acceptance of the application by a State Commission of a hydroelectric company proposing to develop certain power sites was made to the Federal Power Commission, pointing out that the streams to be exploited were of themselves not navigable and would not have any effect upon the navigability of any other streams used and useful in intrastate, interstate, or foreign commerce, and requesting due faith and credit for the jurisdiction and exercise thereof by the State Commission.

[January 3, 1929.]

MEMORANDUM of the West Virginia Public Service Commission to the Federal Power Commission.

By the Commission: The Public Service Commission of West Virginia having heretofore furnished the Federal Power Commission with copies of the application and general plans and drawings of New-Kanawha Power Company, a corporation, in Case No. 1863 on the docket of said Public Service Commission, being an application under the Water Power Act of said state for a permit to construct, maintain, and operate a dam, hydro-electric plant and tunnel on New river, in Fayette county, West Virginia, known as Gauley Junction Dam, and like documents and papers in Case No. 1864, an application for a permit for a similar hydroelectric development known as Hawks Nest dam, also on New river, in Fayette county, West Virginia, also having furnished said Federal Power Commission copies of the report of the said Public Service Commission upon the hearing

and investigation of said applications and copies of the orders made by said Public Service Commission on the 8th day of December, 1928, P.U.R.1929A, 477, granting said permits and prescribing the terms, conditions, stipulations, agreements, and limitations thereof (P. S. C. W. Va. Bulletin No. 115), now has the honor to file herewith, and furnish to the Federal Power Commission, a copy of the written acceptance of said permits and of the terms, conditions, stipulations, agreements and limitations thereof, duly executed by said New-Kanawha Power Company and filed with said Public Service Commission: all said papers and documents being so furnished the Federal Power Commission in conformity with the desire of said Public Service Commission to co-operate with the Federal Power Commission in the fullest possible manner to the end that the comity so essential to the discharge of public duties imposed by law upon Federal and state agencies may be maintained, and that governmental regulation and control of hydroelectric development may not be hampered, and the economic advantages of such development to the citizens of the state of West Virginia may not be dissipated, by conflict of authority or duplication of such regulation and control.

In pursuance of said policy, which is also understood to be adhered to by the Federal Power Commission, the Public Service Commission of West Virginia respectfully represents:

I. That the water power project so authorized under and pursuant to the laws of the said state is the same project concerning which said New-Kanawha Power Company filed with said Federal Power Commission a Declaration of Intention pursuant to the provisions of § 23 of the Federal Water Power Act on the 9th day of May, 1927, requesting that an investigation be made to ascertain whether or not the interests of interstate or foreign commerce would be affected by said proposed construction.

II. That said Public Service Commission has assumed jurisdiction of the subject matter involved in the development of said hydroelectric works, and, pursuant to the duty laid upon it by the laws of said state, has fully investigated, among other things, the following subjects in relation thereto:

(1) Whether or not the said New river is a navigable stream,

and, if so, in what respect the construction of the proposed works would affect the navigability of said river.

(2) Whether or not the construction, maintenance, and operation of said dams and works will affect the navigability of any other stream used and useful in intrastate, interstate, or foreign commerce.

III. That such investigation resulted substantially in the following findings of fact:

(1) That said New river is not a navigable stream.

(2) That the construction, maintenance, and operation of said dams and works, or of either of them, under such permit as might be lawfully granted under the laws of said state, will not result in any impairment of navigation upon the Great Kanawha river, which is formed by the confluence of the New and Gauley rivers, and which is the only other stream that can be affected by such works.

IV. That the Public Service Commission has issued permits according to the tenor and effect of the Water Power Act of said state to New-Kanawha Power Company for the construction, maintenance, and operation of said dams and works for the development of hydraulic power and hydroelectric energy for sale to the public for the period of fifty years; and by the acceptance thereof and of the conditions, stipulations, agreements, and limitations lawfully imposed upon said permittee by the express terms of said permits, the New-Kanawha Power Company has voluntarily agreed and stipulated, among other things, that the state of West Virginia by its proper authority shall at all times have and freely exercise the powers, authority, and jurisdiction to regulate and control the construction, equipment, maintenance, and operation of said dam, hydroelectric plant, and tunnel so as to conserve and protect all public and private rights in the waters of the state, to promote the improvement of and prevent impairment to navigation on any stream affected thereby, and to protect life, health, and property.

V. That the state of West Virginia by its Public Service Commission, whose duty it is, among other things, to investigate, ascertain, and determine all reasonable methods of construction, equipment, maintenance, and operation of any dam and improve-

ment so as to conserve and protect all public and private rights in any of the waters of the state, promote and improve navigation, and protect life, health, and property, stands willing and able, at any time, in the interest of public safety or public rights, to order and require anything reasonably necessary to protect interstate or foreign commerce on the Great Kanawha river or elsewhere within the state; and for such purpose it invites the agents and officers of the United States, as well as the officers of said state, to bring to its attention any failure on the part of said New-Kanawha Power Company to comply strictly with the said terms and agreements of said permits or with the laws of the state of West Virginia. It respectfully submits that the laws of said state, and the said permits so lawfully granted the New-Kanawha Power Company, are ample to prevent the construction, equipment, maintenance, or operation of said dams and works from interfering in any manner with interstate or foreign commerce by virtue of navigation on any stream to be affected thereby.

Wherefore, the Public Service Commission of West Virginia respectfully urges that full faith and credit be accorded the laws of the said state of West Virginia, and the lawful acts and doings of its regularly constituted authorities, in the premises, and that the Federal Power Commission do not undertake to assume jurisdiction of said proposed hydroelectric development on said New river.

TENNESSEE SUPREME COURT.

TENNESSEE EASTERN ELECTRIC COMPANY.

v.

HARVEY H. HANNAH et al.

(— Tenn. —, 12 S. W. (2d) 372.)

Courts — Equity jurisdiction — Declaratory judgments.

1. The chancery court, rather than a law court on certiorari, has jurisdiction to render a declaratory judgment on the propriety of the action of the Commission in denying a certificate of convenience and necessity for the development of water power, p. 220.

P.U.R.1929B.

Appeal and review — Declaratory judgment — Chancery court.

2. The necessity for obtaining a certificate from the Commission by an applicant contemplating a hydroelectric project, in order that it might proceed with proposed development is a sufficiently matured and controversial matter for the rendering of a declaratory judgment on the propriety of the Commission's action by the chancery court, p. 220.

Certificates — Commission powers — Conditions — Rate base.

3. A condition exacted by the Commission as a necessary precedent to the obtaining of a certificate to develop water power, that water power value, as separate and distinct from the value of the land and structures thereon, should not be embraced within the rate base, is unreasonable and unenforceable, p. 222.

Certificates — Commission powers — Conditions — Taxes.

4. A condition exacted by the Commission as a necessary precedent to the granting of a certificate to develop water power, that the applicant pay to the state a certain amount of money per kilowatt hour of current generated by such development, is unreasonable and unenforceable, p. 222.

Certificates — Commission powers — Conditions — Recapture provision.

5. A condition exacted by the Commission as a necessary precedent to the issuance of a certificate to develop water power that the state should reserve the right to recapture the sites at the expiration of fifty years, without any provision for compensation in such an event is unreasonable and unenforceable, p. 222.

Public utilities — Right to do business — General powers of Commission.

6. The right of public service corporations to do business within the state is conferred by statute and does not come from the Public Utilities Commission, p. 222.

[December 22, 1928.]

APPEAL by the Commission from decree of chancellor of the county equity court refusing to enjoin action of the Public Utilities Commission but reversing certain holdings of the Commission; chancellor's decree affirmed.

Appearances: Alfred A. Gillette, of Boston, Cox & Taylor, of Johnson City, and Cornelius & Wade, of Nashville, for appellant; Roberts & Roberts, of Nashville, and Roy H. Beeler, of Knoxville, for appellees.

Chambliss, J.: Complainant is a public service corporation, chartered in Massachusetts and domesticated in Tennessee, owning and operating hydroelectric plants in upper East Tennessee and supplying electricity in that section of the state. The de-

fendant Railroad and Public Utilities Commission, having issued a citation to the complainant to appear and show cause why a certificate of necessity and convenience should be issued to it to make certain developments in the Holston river, this bill was filed, challenging the jurisdiction of the Commission to require complainant to apply for a certificate of necessity and convenience, and challenging also the validity of provisions incorporated by the Commission in the forms promulgated by it, and required by its order to be agreed to by the applicant as a condition precedent of the consideration by the Commission of any application by complainant for said certificate. A declaratory judg ment was sought, defining the rights of the parties, and as a basis of the asserted right to such a judgment it was alleged that application for a permit, or permits, by complainant was pending before the Federal Water Power Commission, essential to the proposed projects for development of water power; that valuable rights were involved; that favorable action by the Federal Water Power Commission was dependent upon the obtaining of certain preliminary evidences of approval from the proper state authorities; and that the initial conditions imposed by the form of application proposed and required by the defendant Commission were arbitrary and unreasonable, and exacted the relinquishment in advance of constitutional rights.

The chancellor sustained a demurrer filed by the Commission in so far as it went to the right of the Commission to issue, and the obligation of the complainant to obtain, a certificate of necessity and convenience as a condition of proceeding with the power developments proposed; but he was of opinion that the making of the rules and regulations challenged was a legislative rather than judicial function, and, therefore, subject to review in his court, and, holding the case a proper one for a declaratory judgment, proceeded to pass upon and adjudge with respect to the various provisions of the form promulgated by the Commission. He found certain of the rules properly subject to objection as unreasonable and beyond the power of the Commission to promulgate.

[1, 2] The chancellor held that the Commission was within its jurisdiction in exacting that the complainant must procure the

issuance of a certificate of necessity and convenience before proceeding, and that holding was not appealed from and is now the law of the case. The appellants insist (1) that the chancery court was without jurisdiction, the remedy being exclusively by certiorari in a court of law; (2) that no case for a declaratory judgment is presented, both because there is no sufficiently matured controversy, in that complainant had not obtained essential preliminary grants from the Federal government, and for lack of a contradictor; and (3) that the chancellor was in error in his holding as to three rules adjudged by him to be unreasonable and invalid. The substance of these will be hereinafter stated.

Without elaborate discussion, we are of opinion that the chancellor was correct in holding, both that the chancery court had jurisdiction, and that a case for a declaratory judgment was fairly made. In Re Cumberland Power Co. 147 Tenn. 504, 511, 249 S. W. 818, is authority for the first proposition. That which is sought to be reviewed in this proceeding is the power exercised by the Commission in making rules for the future, which is a legislative function, not a decision of any controversies arising under its rules, which is a judicial or semijudicial, function.

Nor can we say that the chancellor has gone beyond the limits of his discretionary power in holding the case presented to be the proper subject of a declaratory judgment. "This court is committed to a liberal interpretation of the Declaratory Judgments Act." Hodges v. Hamblen County, 152 Tenn. 395, 277 S. W. 901. His holding that the Commission had the power to require the complainant to obtain from it a certificate is unappealed from. We think the necessity for the obtaining of a certificate, in order that it might proceed with the proposed developments, was made sufficiently to appeal. It was fairly shown that the developments projected could not be proceeded with in compliance with Federal requirements until state authority had been obtained. Complainant was confronted with the alternative of making application for this certificate on the conditions exacted by the rules promulgated by the Commission, which it was alleged exacted in advance the surrender of valuable property

rights as a condition, or of abandoning at great sacrifice its project. And the Commission, whose rules were challenged, represented by the Attorney General, seems to us to be a proper contradictor, so that the controversy was actual, with a real party defendant. Parties representing real interests were thus arrayed on both sides of a substantial controversy.

[3–6] We come now to consider the opinion announced by the chancellor with respect to the three rules or regulations as to which his judgment is here challenged.

These rules, lettered in the Commission's regulations (c), (f), and (h), embrace matters thus stated in the brief of learned counsel for the appellants, complained of in their last three assignments of error:

"(a) Can the Commission legally say, at the time of the application for a certificate of convenience and necessity, that water power value, as separate and distinct from the value of the lands and structures thereon, shall not be embraced within the rate base? In other words, that 'water power value,' as separate and distinct from the value of the land itself, shall not be embraced within the rate base.

"(b) Can the Commission legally say that the applicant for a certificate shall pay to the state of Tennessee not less than one mill per kilowatt hour of electricity generated by the hydroelectric development for which he secured a certificate?

"(c) Can the Commission say that the state reserves the right of recapture at the expiration of fifty years on the terms set out in the certificate of convenience and necessity?"

It will be borne in mind that these rules require, as a condition precedent to the consideration by the Commission of an application for a certificate of necessity and convenience, that the applicant agree *in advance,* (c) to the fixing of a basis for future determination of values and rates involving valuable rights; (f) to the payment of a certain fixed charge; and (h) to such rights of recapture after fifty years by the state as the certificate when issued may prescribe. By this requirement of an advance or preliminary agreement by the applicant against its interest, and waiving or conceding its valuable rights, the applicant was de-

prived of all opportunity for a hearing before the Commission, or otherwise, or elsewhere, of its day in that or any other court.

The right of a water and electric light, heat, and water power company to do business in Tennessee and in the towns and counties thereof—its privilege or franchise—does not come from the Railroad and Public Utilities Commission. Such privilege or franchise is conferred and the terms stated by the provisions of the statutes contained in Thompson's Shannon's Code, § 2489a et seq. If the company is a foreign corporation, such privilege or franchise is derived from the statutes just cited and from those carried into Thompson's Shannon's Code at § 2545 et seq.

Section 3 of Chap. 49 of the Acts of 1919 defines public utilities, over which the Commission is given jurisdiction, as those operating "under privileges, franchises, licenses, or agreements, heretofore granted, or hereafter to be granted, by the state of Tennessee or by any political subdivision thereof."

Having obtained its privilege or franchise under the foregoing statutes, the public utility is confronted by § 7 of Chap. 49 of the Acts of 1919, containing the following:

"That no privilege or franchise hereafter granted to any public utility as herein defined by the state of Tennessee or by any political subdivision thereof shall be valid until approved by said Commission such approval to be given when, after hearing, said Commission determined that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest, and the Commission shall have power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require. . . . "

By this section, the Commission is given power, *after* hearing, to directly impose, as a prerequisite to its approval of the privilege or franchise, conditions as to construction, equipment, maintenance, service, or operation. The primary purpose of these requirements is to promote the public comfort and safety. Rules (c), (f), and (h) are obviously not conditions of this class, but are designed to serve the pecuniary interest of the public. Expressed authority for their imposition is not to be found in the

statutes setting up the Railroad and Public Utilities Commission.

Nevertheless, by § 7, *supra,* the Commission is given power, *after hearing,* to approve a privilege or franchise, if the Commission determines such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest. It would seem that the implied power to withhold its approval of the privilege or franchise *until the public interest is properly conserved* authorizes the Commission indirectly to impose upon the public utility conditions of the tendency of rules (c), (f), and (h). Just what conditions the Commission may impose, directly or indirectly, upon the exercise of such a privilege or franchise, we are not called upon to declare in this case. Section 7 provides for a hearing before a privilege or franchise may be approved or disapproved, and we are satisfied the Commission is without power to exact, in advance of a hearing, such obligations as are contained in rules (c), (f), and (h).

The chancellor was of opinion that all three of these rules were unreasonable and unenforceable, for reasons ably set forth by him. Whatever may be said as to the merits of the questions arising thereunder, and the rights of the state and powers of the Commission, it seems clear to us that it is unreasonable to require that an applicant, shall in advance and without a hearing commit itself irretrievably with regard thereto. We deem it sufficient for the present situation to adjudge with respect to the right of the Commission to exact *in advance* agreements from the applicant touching these matters, leaving open for future disposition, first by the Commission itself, and then by the courts, if review is sought, such issues as may arise. We are of opinion, therefore, that the said rules and regulations should be so amended as to permit the filing of an application, and its consideration by the Board without an exaction of the waiver agreements now provided for thereby.

With the modification indicated, the decree of the chancellor is affirmed.

P.U.R.1929B.